IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-321

LACLEDE GAS COMPANY

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND
MISSISSIPPI RIVER TRANSMISSION CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Laclede Gas Company prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the District of Columbia Circuit, entered April 19, 1979, dismissing for lack of jurisdiction its petition to review orders of the Federal Energy Regulatory Commission.

ORDERS BELOW

The orders of the court of appeals are unreported and are reproduced in full in Appendix A. The orders of the Federal Energy Regulatory Commission are unreported and are reproduced in full in Appendix B.

JURISDICTION

The court of appeals entered judgment on April 19, 1979, and denied a timely petition for rehearing on May 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit can abdicate its jurisdiction under the Natural Gas Act to review orders of the Federal Energy Regulatory Commission, and thereby deprive Petitioner of its right to judicial review by ruling that the agency orders were issued under the Emergency Natural Gas Act of 1977, review of which must be brought in the Temporary Emergency Court of Appeals where (a) the agency declared that it had acted under the Natural Gas Act and (b) the Temporary Emergency Court of Appeals had held in *Lo-Vaca Gathering Co. v. Railroad Commission of Texas*, 565 F.2d 144 (1977) that its jurisdiction under the Emergency Natural Gas Act of 1977 is limited to review of actions of the President or his delegate, the Administrator.

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (1977); the Emergency Natural Gas Act of 1977, 15 U.S.C. § 717 note (Supp. I 1979); and the Natural Gas Policy Act of 1978, 15 U.S.C.A. § 3301, *et seq.* (1979) are set forth in Appendix C.

STATEMENT OF THE CASE

This case involves a dispute between Laclede Gas Company ("Laclede"), a public utility serving the St. Louis, Missouri, area, and its sole supplier of natural gas, Mississippi River Transmission Corporation ("MRT"). The dispute concerned certain tariff sheets filed with the Federal Energy Regulatory Commission ("Commission") under which MRT sought to collect from its regular system customers, including Laclede, rates and surcharges to reimburse MRT for costs charged to it by United Gas Pipe Line Company ("United"), MRT's principal supplier, for emergency natural gas supplies purchased by United under the Emergency Natural Gas Act of 1977 ("ENGA").

Under established Commission procedures, Laclede protested MRT's tariff filing, challenged the propriety of the charges, sought a hearing and requested that MRT's tariff sheets be suspended for one day and made effective subject to refund. By letter order of September 30, 1977,[1] the Commission initially granted Laclede's request but, on rehearing which was sought by MRT, reversed itself, denied Laclede a hearing and permitted the tariff sheets to become effective without refund liability.[2]

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[1]Appendix B at A-8.

[2]Appendix B at A-14.

Laclede sought rehearing, asking for an opportunity to show that under its filing, MRT would receive windfall profits by assigning all of the emergency gas and related, higher charges to its regular system customers, despite its having sold a like volume of lower-cost, regular system supply off-system to Natural Gas Pipeline Company of America ("Natural") under Commission regulations at similarly high emergency prices. Laclede contended that, if hearings were held, it would show that a major part of the $8.1 million which MRT had paid United for the emergency gas, and was seeking to assign to its system customers, was actually recouped by MRT through its own off-system, emergency sale to Natural.

On April 24, 1978, the Commission denied Laclede's petition for rehearing and summarily disposed of Laclede's contentions.[3] Laclede then sought review of the Commission's orders in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

In a *per curiam* order, the D.C. Circuit dismissed Laclede's petition for review, disclaiming jurisdiction to review the Commission's orders on the ground that the Commission had "acted under ENGA in aid of the President's delegated authority." The D.C. Circuit concluded:

> It follows, we think, that suits concerning the exercise of that authority arise under ENGA for purposes of judicial review, which is . . . lodged solely in the Temporary Emergency Court of Appeals.[4]

[3]Appendix B at A-32.

[4]Appendix A at A-3.

Laclede sought rehearing explaining to the court that the Commission did not act under ENGA; that the Temporary Emergency Court of Appeals ("TECA") had held that its jurisdiction under ENGA is limited to suits challenging actions by the Administrator, and no such action is involved; that the Commission issued its orders in the exercise of its authority under the Natural Gas Act ("NGA"); that TECA has no power to review Commission orders issued under the NGA; and that Section 19(b) of the NGA places jurisdiction over petitions to review Commission action exclusively in the courts of appeals. Therefore, Laclede explained, the effect of the dismissal was to deprive Laclede of a forum in which to obtain review of the Commission's orders. The D.C. Circuit denied rehearing.[5]

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari for the following reasons:

1. The decision of the D.C. Circuit directly conflicts with TECA's decision in *Lo-Vaca Gathering Company v. Railroad Commission of Texas, supra,* the effect of which is to deny Petitioner judicial review of the orders of the Commission;

2. The jurisdictional dispute between the D.C. Circuit and TECA raises significant and recurring problems regarding the proper forum in which review proceedings may be brought; and

3. The D.C. Circuit's decision disregards the rule of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

[5]Appendix A at A-5 to 6.

1. The Decision of The D.C. Circuit Directly Conflicts With TECA's Decision in *Lo-Vaca Gathering Co. v. Railroad Commission of Texas* And Denies Petitioner Judicial Review

The decision below conflicts with the only reported court opinion interpreting the judicial review provisions of ENGA. That opinion, rendered by TECA in *Lo-Vaca Gathering Co. v. Railroad Commission of Texas, supra*, is factually indistinguishable from the present case and irreconcilable with the D.C. Circuit's decision.

In that case, Lo-Vaca Gathering Co. ("Lo-Vaca"), an intrastate pipeline, had been ordered by the Administrator to transport natural gas pursuant to ENGA. The Administrator fixed the compensation that Lo-Vaca was to receive for transporting such gas. The Railroad Commission of Texas issued an order instructing Lo-Vaca how to allocate the compensation realized among its customers. Lo-Vaca claimed that the effect of the order was to lessen the compensation it was entitled to receive under ENGA and appealed to TECA to set aside the order. TECA ruled that its jurisdiction under ENGA was limited to review of actions taken by the Administrator under the Act and that it could not review actions of a state regulatory commission.

In this case, the D.C. Circuit refused to review the Commission's orders concerning whether MRT could properly charge the ENGA costs in the manner that it proposed. Instead, the D.C. Circuit held that the Commission's orders were reviewable by TECA. It is undisputed that the Administrator of ENGA issued no

order respecting MRT's transactions. The Administrator not having acted, an original claim could not be brought in TECA. By refusing to review the Commission's orders through a misunderstanding of ENGA and its interaction with the NGA, the D.C. Circuit has left Laclede without a forum.

The Emergency Natural Gas Act of 1977 was enacted to alleviate the problems created by the critical shortage of natural gas experienced during the 1976-77 winter. The crisis arose, in part, because the NGA did not give the Commission the power to issue orders requiring the transfer of natural gas supplies from the intrastate to the interstate market. To permit and encourage such transfers, ENGA authorized the President or his delegate (the Administrator)[6] to exempt certain specified transactions from regulation under the NGA. Thus, the price of emergency natural gas was to be "fair and equitable"; not "just and reasonable" as required by Section 4 of the NGA. Additionally, once the Administrator approved a purchase under Section 6(a), the transaction could go forward without the certificate of public convenience and necessity that would normally be required by Section 7 of the NGA. ENGA suspended the applicability of the NGA as to (1) any sale of natural gas authorized by the Administrator *to* an interstate pipeline company or a local distribution company *by* any qualified producer, *intra*state pipeline, local distribution company, or other person (the term "person" excludes interstate pipelines and producers);[7] (2) any *transportation* by an *intra*state pipeline in connection with the authorized sale of emergency natural gas by a qualified producer, *intra*state piepline, local distribution company,

[6]Exec. Order No. 11969, 3 C.F.R. 93 (1978), *reprinted in* 15 U.S.C. § 717 at 289 (Supp. I 1979).

[7]15 U.S.C. sec. 717 note, § 6(b)(1)(A) (Supp. I 1979).

or other person (the term "person" excludes interstate pipelines and producers);[8] or (3) any natural gas company for either the sale or transportation of emergency gas supplies if such sale or transportation had been specifically approved by the Administrator. These provisions apply *only* to the authorized purchaser or transporter. ENGA does not authorize sales of emergency gas between interstate pipelines and does not exempt any such sale from the provisions of the NGA.[9]

Section 6(b)(2) is the only provision of ENGA which restricts the Commission's authority over those natural gas companies subject to its jurisdiction which did not make purchases or provide transportation pursuant to Section 6(a) authorization, such as MRT. Section 6(b)(2) of ENGA expressly provides:

> *In exercising its authority under the Natural Gas Act*, the Federal Power Commission shall not disallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported, or other costs incurred. . . .

15 U.S.C. sec. 717 note, § 6(b)(2) (Supp. I 1979) (emphasis added). No further limitations on the Commission's authority to act under the NGA were specified. In fact, to ensure NGA applicability, Section 8 of ENGA provides:

[8] *Id.*

[9] These "emergency sales", like that made between MRT and Natural, are routinely made between interstate pipeline companies under the Commission's regulations. *E.g.*, 18 C.F.R. § 157.22 (1978).

> Except as expressly provided in this Act, nothing contained in this Act shall be interpreted to change, modify, or otherwise affect rules, regulations, or other regulatory requirements or procedures of the Federal Power Commission pursuant to the provisions of the Natural Gas Act.

15 U.S.C. sec. 717 note, § 8 (Supp. I 1979).

Therefore, according to the plain language of ENGA, the NGA is fully applicable to the flow-through of costs from MRT to its resale customers, such as Laclede. The only restriction on the Commission's exercise of jurisdiction over MRT's collection of rates and charges as reimbursement for costs attributable to United's ENGA purchases was that, in determining whether the MRT's *overall* rates were just and reasonable, the Commission could not disallow ENGA costs.[10] MRT received no immunity from Commission scrutiny under the NGA because of the flow-through of ENGA costs. ENGA does not confer transactional immunity. Nor does ENGA eliminate the Commission's traditional duty to ensure that consumers are protected from excessive rates and charges of natural gas companies. *See Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 388 (1959). That duty necessarily includes the need to scrutinize the recovery of ENGA costs by intermediate pipelines such as MRT. Thus, it is clear from an examination of the interaction between ENGA and the NGA that, because TECA was correct in *Lo-Vaca*, the D.C. Circuit was wrong in its

[10] 15 U.S.C. sec. 717 note, § 6(b)(2) (Supp. I 1979).

decision below. Jurisdiction to review orders of the Administrator lies in TECA; jurisdiction to review orders of the Commission lies in the circuit courts of appeals.

2. The Jurisdictional Dispute Between The D.C. Circuit and TECA Raises Significant And Recurring Problems Regarding The Proper Forum In Which Review Proceedings May Be Brought

Although the statute in question, ENGA, has terminated, the provisions of ENGA at issue in this case have been enacted in virtually identical form as a part of the Natural Gas Policy Act of 1978 ("NGPA"). Section 301 of the NGPA, like ENGA Section 3, authorizes the President to declare a natural gas emergency. Section 302(a), which authorizes the President to permit emergency purchases of natural gas, is virtually identical to ENGA Section 6(a). As in ENGA Section 6(b)(2), NGPA Section 601 prohibits the Commission from denying the flow through by an interstate pipeline company of costs from sales authorized under Section 302. Additionally, NGPA Section 506(c) provides that TECA shall have the sole jurisdictional authority to hear cases and controversies arising under the NGPA Section 302 orders authorizing purchases and sales of emergency natural gas.[11]

The goal of the emergency legislation at issue here, and that incorporated into the NGPA, is to permit immediate relief to consumers in critical supply shortages. Obviously, the natural gas companies which acquire such emergency supplies should be compensated for the admittedly higher

[11] *See* Appendix C at A-64 to 73.

costs incurred to alleviate the emergency. This does not mean, however, that a natural gas company should be permitted to abuse the purpose of remedial legislation to obtain windfall profits for its shareholders at the expense of its ratepayers. The juxtaposition of the D.C. Circuit's decision in this case with that of TECA in the *Lo-Vaca* case eliminates any opportunity for judicial review of the Commission's actions concerning flow-through to the ratepayers of the extraordinary costs involved.

Laclede has been placed in an untenable posture in this case by having been denied its right to judicial review of Commission orders guaranteed to it by the NGA. The court orders interpreting the jurisdiction of TECA and the circuit courts of appeals present an irreconcilable conflict which will leave future ratepayers, in cases arising under the NGPA, without a forum to challenge questionable agency orders such as those issued in this case.

3. The D.C. Circuit's Decision Improperly Ascribes A New Legal Basis For The Commission's Action

The Commission's brief to the D.C. Circuit expressly stated that the Commission had acted under the NGA. The D.C. Circuit, however, ruled that the Commission acted under ENGA. A court may not ascribe a new legal basis for the Commission's action, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

If the D.C. Circuit had accepted the Commission's statement of the statutory authority under which it had acted—the NGA—there would be no question of its jurisdiction and duty to review. By construing the Commission's action as action under ENGA, the D.C. Circuit abdicated its jurisdiction and deprived Laclede of its right to judicial review of the Commission's orders.

If this Court denies this Petition, a gap will have been created by which certain Commission action regarding the rates and charges of a natural gas company such as those in this case will evade judicial review by falling through the crack between two pieces of legislation, both of which were enacted to aid and protect the public—the NGA and ENGA.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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August 28, 1979

APPENDIX A

APPENDIX A

Orders Of The United States Court Of Appeals For The District Of Columbia Circuit.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1379 *Filed: APR 19 1979*

Laclede Gas Company,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Mississippi River Transmission,

Intervenor

BEFORE: McGowan and Wilkey, Circuit Judges; and Corcoran*, Senior District Judge, United States District Court for the District of Columbia

ORDER

This cause came on to be heard on a petition for review of an order of the Federal Energy Regulatory Commission and was argued by counsel. The Court is of

*Sitting pursuant to Title 28 U.S.C. § 294(d).

the opinion that petitioner's suit arises under the Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 4, and in accordance with § 10(b) of the Act, is within the exclusive jurisdiction of the Temporary Emergency Court of Appeals, established pursuant to § 211(b) of the Economic Stabilization Act of 1970, as amended. The instant petition calls into question the manner by which Intervenor Mississippi River Transmission Corp. has sought to recover from its customers, including petitioner, charges incurred by it for certain purchases of natural gas. We agree with the Commission and Intervenor Mississippi that the purchases in question, although made from another interstate pipeline, were pursuant to § 6 of ENGA and as such were expressly exempted from the terms of the Natural Gas Act, 15 U.S.C. §§ 717a-w. The recovery of amounts paid by interstate pipelines for § 6 purchases is, we think, governed exclusively by ENGA, and by the ENGA Administrator's Order No. 7, which order was issued under authority delegated by the President pursuant to ENGA § 13. *See* Executive Order No. 11969, 42 F.R. 6791 (2 Feb. 1977). In accordance with Order No. 7, Intervenor Mississippi filed with the Commission the tariff sheets at issue in the subject proceeding. Insofar as the Commission had any authority whatsoever to review the filing's conformance with ENGA and Order No. 7, a question we have no occasion to decide, it acted under ENGA in aid of the President's delegated authority. It follows, we think, that suits concerning the exercise of that authority arise under ENGA for purposes of judicial review, which is, as we have said, lodged solely in the Temporary Emergency Court of Appeals. Because this Court is without jurisdiction to entertain the instant petition, it is

ORDERED, by the Court, that the petition for review filed herein be, and it is hereby, dismissed.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1379 *Filed: MAY 30 1979*

Laclede Gas Company,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Mississippi River Transmission,

Intervenor

BEFORE: McGowan and Wilkey, Circuit Judges; and Corcoran*, Senior Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of petitioner's petition for rehearing, it is ORDERED, by the Court, that petitioner's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1379 *Filed: MAY 30 1979*

Laclede Gas Company,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

Mississippi River Transmission,

Intervenor

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by petitioner Laclede Gas Company, having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that petitioner's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

George A. Fisher

GEORGE A. FISHER
Clerk

Chief Judge Wright did not participate in the foregoing order.

APPENDIX B

APPENDIX B

Orders Of The Federal Energy Regulatory Commission.

FEDERAL POWER COMMISSION
Washington, DC 20426

SEPT 30 1977

In reply refer to:
BNG-76
Mississippi River Transmission
Corporation
Docket No. RP72-149
(PGA 77-10)

Mississippi River Transmission
Corporation
9900 Clayton Road
St. Louis, Missouri 63124

Attention: C. R. Eberst, Jr., Vice President, Rates

Reference: (1) Fifty-Ninth Revised Sheet No. 3A
(2) Original Sheet No. 3B
(3) Alternate Original Sheet No. 3B to FPC Gas Tariff, First Revised Volume No. 1.

Gentlemen:

The tariff sheet referred to in Item (1) above containing increased rates to recover increased purchased gas costs and transportation costs, has been accepted effective October 1, 1977. Such acceptance is subject to modification to reflect any changes in the rate of Natural Gas Pipeline Company of America being tracked herein.

The tariff sheet referred to in Item (3) containing alternate individual customer surcharges to recover ENGA costs (including storage costs over an eleven month period) is suspended for one day and made effective subject to refund as of October 2, 1977. The tariff sheet referred to in Item (2) containing alternate individual

surcharges to recover ENGA costs (including storage costs over a five month period) is rejected without prejudice to this being considered as an issue in these proceedings.

A hearing shall be held in this proceeding at a later date to be established by this Commission.

The petition to intervene by Laclede Gas Company is hereby granted.

This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of the referenced filing or of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in your tariff; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

By direction of the Commission.

Kenneth F. Plumb
Secretary

cc. William W. Bedwell
Bedwell and Rudolph
502 Madison Building
1155 — 15th Street, N.W.
Washington, D.C. 20005

All Parties

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

REHEARING: GRANTED,
PRACTICE AND PROCEDURE

Before Commissioners:

Charles B. Curtis, Chairman;
Don S. Smith, Georgiana Sheldon,
Matthew Holden, Jr., and George R. Hall

Mississippi River Transmission Corporation	)	Docket No. RP72-149 (PGA77-10)

ORDER GRANTING REHEARING
FOR PURPOSES OF FURTHER
CONSIDERATION AND GRANTING MOTION
TO WAIVE SECTION 1.34 OF
THE COMMISSION'S RULES

(Issued November 28, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission (FPC) ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC or Commission) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a)(1) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer on Proceedings to the Secretary of Energy and the FERC," 10 CFR ____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On August 31, 1977, Mississippi River Transmission Corporation (MRT) filed tariff sheets in this proceeding reflecting increased gas rates. On September 27, 1977, Laclede Gas Company (Laclede) filed a petition to intervene and protest to MRT's proposed higher rates.

Laclede objects on two grounds to MRT's treatment of the costs associated with Emergency Natural Gas Act of 1977 (ENGA)[1] gas purchases by United Gas Pipe Line Company (United) which were allocated to MRT. First, Laclede questions the appropriateness of recovering ENGA costs, and carrying charges thereon, which MRT has allocated to storage and requests that MRT be

[1]Act of February 2, 1977, Pub. L. No. 95-2, 91 Stat. 4.

required to modify its filing so as to exclude these costs. These ENGA costs related to storage total approximately two million dollars or one quarter of the total costs associated with ENGA gas purchases by United allocated to MRT. Second, Laclede challenges MRT's flow through of the balance of the gas costs associated with the ENGA gas purchased by United. Because MRT owns and operates substantial storage facilities, Laclede alleges that the method used for the assignment of these gas costs may well represent an allocation of costs that is unduly prejudical to MRT's jurisdictional customers.

On September 30, 1977, the FPC by letter order, *inter alia*, suspended for one day and made effective, subject to refund, on October 2, 1977, the increased rates to recover MRT's costs associated with purchases by United of the ENGA gas during the period February 1977 through July 1977.[2] The letter order also grants the petition to intervene filed by Laclede and states:

> A hearing shall be held in this proceeding at a later date to be established by this Commission.

On October 27, 1977, MRT filed an application for rehearing questioning the Commission's actions. On November 14, 1977, Laclede filed a motion for leave to file a response to MRT's application for rehearing and a response to the application for rehearing.

In order to more fully consider the issues raised by MRT and Laclede, which involve the proper interpretation of the ENGA and the Natural Gas Act, it is appropriate and in the public interest to grant MRT's application for rehearing for purposes of further consideration and to grant Laclede's motion to waive the

[2]Alternate Original Sheet No. 3B to MRT's Gas Tariff, First Revised Volume No. 1.

provisions of Section 1.34 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 1.34 (1977), so as to consider Laclede's filing. Since Laclede is the only party to this proceeding, no other response within the meaning of Section 1.34(d), to MRT's application for rehearing is contemplated under the rules.

The Commission Orders:

(a) Laclede's motion to waive the provisions of Section 1.34 of the Commission's Rules of Practice and Procedure is granted.

(b) MRT's application for rehearing is hereby granted for purposes of further consideration.

By the Commission.
(S E A L)

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PIPELINE RATES:
[Rehearing, Emergency
Natural Gas Act of
1977, Jurisdiction]

Before Commissioners:

Charles B. Curtis, Chairman;
Don S. Smith, Georgiana Sheldon,
Matthew Holden, Jr., and George R. Hall.

Mississippi River Transmission Corporation	)	Docket No. RP72-149 (PGA77-10)

ORDER GRANTING REHEARING,
VACATING PRIOR ORDER,
GRANTING INTERVENTION, AND
TERMINATING PROCEEDING

(Issued February 27, 1978)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission (FPC) ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC or Commission) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a)(1) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer on Proceedings to the Secretary of Energy and the FERC," 10 CFR ____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On August 31, 1977, Mississippi River Transmission Corporation (MRT) tendered for filing with the Federal Power Commission (FPC) certain revised tariff sheets to its Gas Tariff setting forth increased rates proposed by MRT to become effective on October 1, 1977. The proposed rates reflect MRT's share of costs flowed-through by its supplier, United Gas Pipe Line Company (United) attributable to emergency gas purchases made by United under the Emergency Natural Gas Act of 1977 (ENGA).[1] The proposed rates also include carrying charges on MRT's share of the emergency gas costs.

[1]Pub. L. No. 95-2, 91 Stat. 4 (1977).

On September 27, 1977, Laclede Gas Company (Laclede) filed a protest and petition to intervene that objected on two grounds to MRT's treatment of the costs associated with ENGA gas purchases by United as allocated to MRT. First, Laclede questions the appropriateness of recovering ENGA costs, and carrying charges thereon, which have been allocated to storage and requests that MRT be required to modify its filing so as to exclude these costs. Second, Laclede challenges the allocation of the balance of the gas costs associated with the ENGA gas purchased by United. Because MRT owns and operates substantial storage facilities, Laclede alleged that the monthly assignment of gas costs may well represent a misallocation of costs that is unduly prejudicial to MRT's jurisdictional customers.

MRT's proposed rates were suspended by the FPC by letter order dated September 30, 1977, and were permitted to become effective on October 2, 1977, subject to refund. The letter order permitted Laclede to intervene in the proceeding and provided, in addition, that: "A hearing shall be held in this proceeding at a later date to be established by this Commission."

On October 27, 1977, MRT filed an application for rehearing, questioning the Commission's actions in the September 30, 1977, letter order.[2] On November 14, 1977, Laclede filed a response to MRT's application for

[2]On November 16, 1977, Illinois Power a customer of MRT, filed an untimely petition to intervene. Illinois Power Company cites Laclede's September 27, 1977, protest and states that the increase sought by MRT is excessive and may be unjust and unreasonable. We grant this petition to intervene hereinafter.

rehearing.[3] Rehearing for purposes of further consideration was granted on November 28, 1977. For the reasons set forth in this order, the Commission shall grant MRT's application for rehearing.

MRT argues that the Commission erred because it lacks jurisdiction to take action with respect to recovery of ENGA costs, because the Commission did not permit MRT to respond to Laclede's protest of September 27, 1977, and because the Commission does not have the substantive authority to preclude the full recovery of ENGA purchases paid by United.

In its response to the MRT application for rehearing, Laclede argues that it is not seeking outright disallowance of ENGA costs but it does contest the view that there should be automatic flow-through under ENGA of capitalized costs associated with gas storage or that nonjurisdictional purchasers of ENGA gas should not be made to bear some portion of the costs. Also, Laclede asserts that since MRT did not directly purchase ENGA gas, it should not proceed under the recoupment provisions of the ENGA enacted regulations; rather, MRT must justify its purchased gas costs under the Natural Gas Act, appropriate Commission regulations, and MRT's tariff.

[3]On November 23, 1977, MRT also filed a motion to strike Laclede's response to the application for rehearing. On December 16, 1977, MRT filed a response in opposition to Laclede's response of November 14. Because of the Commission's disposition on rehearing in favor of MRT, the motion to strike is rendered moot.

ISSUE

During the 1977 winter emergency, United utilized ENGA to purchase volumes of natural gas for its system supply. As part of the authorized ENGA procedures, which will be discussed later, United allocated to its customers, one of whom is MRT, a portion of the cost incurred in entering into the emergency sales. The first question then, is whether MRT is a qualified party to flow-through to its customers the share of ENGA costs allocated to MRT by United. Secondly, if flow-through is permissible, did MRT properly assign its costs among the MRT customers?

Whether ENGA applies to MRT in this situation depends on an interpretation of the statute. Section 6(a) of the law provides:

> The President may authorize any interstate pipeline or local distribution company served by an interstate pipeline (or class or category of such pipelines or companies) to contract upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for emergency supplies of natural gas for delivery before August 1, 1977-
>
> (1) from any producer of natural gas (other than a producer who is affiliated with the purchaser as determined by the President) if (A) such natural gas is not produced from the Outer Continental Shelf and (B) the sale or transportation of such gas was not, immediately before the

> date on which such contract was entered into, certificated under the Natural Gas Act, or
>
> (2) from any intrastate pipeline, local distribution company, or other person (other than in interstate pipeline or a producer of natural gas).

Purchases made under Section 6(a) were exempt from the provisions of the Natural Gas Act[4] and the costs incurred could not be disallowed for flow-through by the Federal Power Commission.[5] Thus, it is clear that United, the contracting party, was entitled to recover its ENGA expenses from MRT, the customer. But, since MRT was not the contracting party, and is not a "local distribution company served by an interstate pipeline" under Section 6(a), can MRT pass through the ENGA costs allocated to it by United?

A literal reading of the statutory language could lead

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[4] Section 6(b)(1) of ENGA states in pertinent part:

> The provisions of the Natural Gas Act shall not apply—
>
> (A) to any sale of natural gas to an interstate pipeline or local distribution company under the authority of subsection (a) or to any transportation by an intrastate pipeline in connection with any such sale. . . .

[5] Section 6(b)(2) of ENGA states:

> In exercising its authority under the Natural Gas Act, the Federal Power Commission shall not dissallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported, or other costs incurred pursuant to subsection (a).

to the conclusion that MRT, as an intermediary, is not covered by Section 6(a) of ENGA. We decline to adopt this limited view because the result would not be consistent with the Congressional intent in enacting the emergency legislation nor with the orders of the Administrator in running the program.[6]

The severe weather conditions during the 1976–77 winter season raised the prospect of curtailment into priority one if additional supplies could not be made available to the interstate market.[7] The Federal Power Commission's emergency purchase provisions were not deemed adequate to meet the emergency, largely because of the legal consequences of an intrastate company making

[6]*See U.S.* v. *American Trucking Ass'ns Inc.*, 310 U.S. 534, 543 (1940).

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.

[7]*See* Statement of Harley O. Staggers, Cong. Rec. H514 (January 26, 1977), introducing the ENGA legislation.

an interstate sale in excess of sixty days.[8]

The proposed ENGA legislation was designed to authorize:

> . . . emergency sales of intrastate natural gas to the interstate market through July 31, 1977 at prices that are fair and equitable, thereby ending legal uncertainties presently connected with such sales.[9]

Furthermore, the bill was passed on the express representation that prices approved by the President would not be subject to subsequent tampering.

> It is our intention to provide price certainty so that once a specific transaction has been

[8]Letter from President Carter to the Honorable Walter F. Mondale, President of the Senate, January 26, 1977, transmitting the ENGA legislation to the Senate, introduced into the Congressional Record by Senator Robert C. Byrd, Cong. Rec. S.1538-39. The President stated:

> The natural gas pipelines and the Federal Power Commission are attempting to cope with this emergency, but both agree that existing laws may be inadequate to prevent further human suffering in February. The Federal Government lacks clear and effective authority to allocate supplies needed to meet these needs. In addition, surplus gas may be available in the intrastate market that would not flow into interstate commerce under existing law.

See Houston Pipe Line Company, Order Interpreting Section 2.68 Of The Commission's General Policy And Interpretations, Docket No. CP77-117 (January 14, 1977), *rehearing denied* (March 10, 1977).

[9]President Carter's letter of January 26, 1977, *supra*, note 8.

> authorized by the President, there would be no risk of a roll-back for that transaction. In any event, there would be no roll-back of the price for a specific transaction once it had been authorized by the President.[10]

From this we conclude that ENGA ensured price certainty to emergency purchases made thereunder by the initial purchaser. Also, we find that since the legislation was intended to protect end users, it was those persons who would bear the costs incurred. Obviously, if the argument of Laclede is accepted, not only would there be no price certainty for the ENGA purchases at issue here, but there would also be the possibility that in a rate review under the Natural Gas Act the actual users of the gas purchased would not be assessed the full value of the ENGA costs. This result is patently alien to the statutory purpose and is rejected.

Our interpretation of ENGA is supported by the actions taken thereunder by its Administrator, then FPC

[10]Conference Report to accompany S. 474, Report No. 95-7, 95th Cong., 1st Sess. (February 2, 1977) at 10, citing a letter dated January 31, 1977, from James R. Schlesinger, Assistant to the President, to the Honorable Adlai E. Stevenson.

Chairman Richard Dunham.[11] In Order No. 2[12] the Administrator interpreted Section 6(a) of ENGA and declared that:

> [n]o subsequent action by the Administrator may require a refund of any monies collected or the reduction of prices in any transaction complying with the Act.[13]

[11]Chairman Dunham was delegated the authority reserved by ENGA to the President, except under Section 3 authorizing the declaration or termination of a natural gas emergency, by Executive Order No. 11969, 42 Fed. Reg. 6791 (February 4, 1977). The President declared a natural gas emergency in Proclamation No. 4485, 42 Fed. Reg. 6789 (February 4, 1977), stating:

> Abnormal weather conditions have caused prevailing temperatures in the United States, particularly in the East and Midwest, to be well below normal for the past three months. Many interstate natural gas pipelines and local natural gas distribution companies do not have sufficient supplies of flowing or stored gas to meet current demand. The shortage of natural gas available to some interstate pipelines and local distribution companies has been so severe as to cause them to curtail or to be in imminent danger of curtailing natural gas supplies to residences, small commercial establishments and other high priority users, so as to endanger life or health, and risk damage to plant or other facilities.

[12]42 Fed. Reg. 7948 (February 8, 1977).

[13]*See* Order No. 5, 42 Fed. Reg. 9673 (February 17, 1977) further interpreting Order No. 2.

> When a transaction is made under that order, including all delivery or transportation arrangements, whether or not covered by an express authorization of the Administrator in a specific order, the transaction shall be deemed to be 'authorized' and 'ordered' for purposes of Sections 6 and 9 of the Act.

In addition, Order No. 7,[14] which will be discussed in greater detail later, dealt with the allocation and billing method of the ENGA costs. The Order refers in footnote two to Section 7 of the Act, part of which reads:

> [c]ompensation paid by an interstate pipeline for deliveries or emergency purchases of natural gas pursuant to . . . section 6 shall be charged to such interstate pipeline's local distribution companies in proportion to their share of such natural gas deliveries or purchases.

The Administrator interpreted that language to mean that:

> [s]uch allocation shall apply to sales made to direct customers and *pipeline purchases*, as well as distribution companies.[15]

It is apparent then that the Administrator viewed the ENGA costs as inviolate, and that the purchases of one interstate pipeline for system supply that includes service to another interstate pipeline would still qualify for untouched flow-through to the end user.

For these reasons, we are compelled to reject Laclede's interpretation that the flow-through provisions of ENGA extend only to costs incurred by the pipeline who contracts for the emergency gas, in this case United. To so find would be to conclude that Congress intended that the allocation and recovery of ENGA-related costs could stop at a certain level and thereafter be subject to

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[14] 42 Fed. Reg. 22146 (May 2, 1977).

[15] *Id.* (emphasis added).

regulation under statutory authority other than ENGA. Yet, Section 6(b)(2) of ENGA, by its terms, indicates that no such limitation applies. Recovery of *all* costs by *any* interstate pipeline is not to be denied under the authority of the Natural Gas Act. We believe that Congress did not intend to impose restrictions other than those contained in ENGA. Congress intended that the ENGA gas and the costs therefor would flow-through to the burner tip governed only by the provisions of ENGA and actions of the Administrator pursuant thereto. The construction of ENGA urged by Laclede is neither a fair construction nor consistent with the intent of Congress.

Laclede's second assertion is that proper ENGA costs do not include capitalized costs incurred in filling storage, and that ENGA costs must be allocated to nonjurisdictional as well as jurisdictional customers. Order No. 7 delineates the procedures by which ENGA costs would be recovered. In that Order the Administrator determined that ENGA charges attributable to gas purchased for general system supply, as in the instant case, would be billed proportionately according to the pipeline's applicable curtailment plan.[16] Regulations had already been enacted to define the proper billing procedures.[17] Order No. 7 also provided for the allocation of costs between sales for resale, direct sales and storage injection on the

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[16] This allocation method was decided upon as the fairest method of balancing the costs incurred and the benefits derived by the pipeline's customers. Order No. 7 at mimeo pp. 4–5.

[17] 18 CFR § 1000.9, entitled Allocation of Charges for Emergency Purchases. *See also, Order Establishing Accounting And Billing Procedures For Interstate Natural Gas Pipelines*, Docket No. RM77-10 (February 5, 1977).

basis of volumes delivered for each month that ENGA purchases were made.

United billed MRT $8,105,866 as its share of United's emergency gas purchases under ENGA. MRT then allocated that amount among its various services according to the following categories: jurisdictional sales for resale, $4,162,343; nonjurisdictional direct sales, $1,938,960; and storage injections, $2,004,564. Laclede alleges that because of the interposition of storage between MRT's purchases and deliveries, the allocation of costs for individual monthly periods may represent a misallocation of costs that is unduly prejudicial to the company's jurisdictional customers.

Laclede's concern appears to be with the differing circumstances (customers and gas usage change between winter and summer) between the time that gas is purchased for injection into storage and the time these volumes are withdrawn from storage for delivery to distributors. For example, the second allocation by MRT occurs when the cost previously assigned to storage, $2,004,564, are divided between jurisdictional ($1,754,512) and nonjurisdictional ($250,052) customers, based upon projected winter season volumes. Thus, MRT has sought herein to recover the $4,162,342 originally assigned to sales for resale and the $1,754,512 originally assigned to storage and later allocated to jurisdictional customers.

As to the $4,162,342, MRT elected to bank its costs, pursuant to Order No. 7, for recovery over the eleven month period commencing October 1, 1977. MRT computed a surcharge for each of its customers based on their purchases during the months when the costs were incurred and the customer's anticipaed purchases for the

proposed recovery period, October 1, 1977 to August 31, 1978. In order to recover the $1,754,512, MRT set a separate uniform storage surcharge, also to be effective for the October to August period. Both surcharges will remain in effect according to Order No. 7 until the banked ENGA costs, plus applicable carrying charges, have been fully repaid.

Natural gas injected during the summer months is withdrawn during the winter heating season. Lower priority and nonjurisdictional interruptible customers that may be served in the summer would normally be cut off during the winter. Thus, in allocating costs for ENGA purchases made to fill depleted storage in anticipation of the coming (1977–1978) winter, using the actual withdrawals for this winter as the measure of payment assigns the burden of payment of those that benefit from the storage. We recognize that during certain of the winter months both ENGA gas and storage withdrawals were required to meet market requirements; since both sources were used for system supply, it is equitable to assign the ENGA gas costs on the basis of monthly deliveries or sales.

ENGA was enacted to help alleviate a critical natural gas shortage that had the potential for endangering life and property. Storage balances were critically low and there was uncertainty as to whether sufficient gas supply would be available during the ensuing summer to replenish these reservoirs. Section 6 of ENGA provided for emergency purchases through July 31, 1977, for the express purpose of filling storage.[18] In acknowledgement

[18]Senator Stevenson, Senate manager of ENGA, stated, Cong. Rec. S1670 (January 31, 1977):

> This measure, which we act upon today, is also a measure to protect the country for next winter because it will, through its pricing provisions, enable the interstate pipeline companies to buy such stores of natural gas as are available and restock their depleted natural gas storage facilities.

of this goal, the Administrator provided for the allocation, on a volumetric basis, of emergency gas costs between storage and sales. Our review of the MRT rate filings and other filings in this docket results in the conclusion that the company's method of allocation, which was, in our judgment, consistent with Order No. 7, properly assigned to its jurisdictional customers a reasonable level of costs.

Laclede has also argued that carrying costs on storage injection under the existing curtailment plan is not properly recoverable under ENGA. The regulations enacted in Order No. 7 provide specifically to the contrary.

§ 1000.9(e)(i)

The following billing procedures may be utilized by interstate pipeline companies to *flow-through all authorized costs* of ENGA purchases pursuant to Section (6) of the Act:

(2) If an interstate pipeline company's monthly ENGA purchases exceed 2.0 percent of its forecasted monthly sales in its September 1976 FPC Form No. 16 for the months of February and March 1977 and for ensuing months its April 1977 FPC Form No. 16, alternate billing options are available to the company. ENGA purchases would be allocated pro rata to its customers and *storage* on the basis of total sales and *general system storage injections* for the billing month and may be recovered as follows:

* * *

(ii) The Company may elect to bank the ENGA costs allocated to each customer through July 31, 1977. These banked costs, *plus carrying costs* computed at nine (9) percent per annum, would

be recovered from each customer over an eleven month period beginning October 1, 1977 and ending August 31, 1978. Individual surcharges for each customer would be computed by dividing each customer's banked costs by each customer's forecasted eleven month sales included in the pipeline company's September 1977 FPC Form No. 16.

(3) If an interstate pipeline company elects to utilize the revenue recovery procedures provided in 2(ii) above, each individual surcharge will remain in effect until the interstate pipeline company recovers banked costs, *plus applicable carrying charges*. (footnote omitted — emphasis added)

Since MRT is seeking merely to flow-through authorized ENGA costs according to the procedures instituted by the Administrator, Laclede's allocation argument has no basis and is rejected.

Based on the foregoing considerations, the Commission concludes that under the circumstances presented by this case the Commission is without authority to suspend or disallow rates derived from authorized ENGA purchases calculated in accordance with the Administrator's Order No. 7. The Commission's letter order of September 30, 1977, shall be vacated, and MRT's proposed tariff sheet shall be accepted for filing, effective October 1, 1977.

The Commission Finds:

(1) It is appropriate and in the public interest that MRT's application for rehearing be granted as hereinafter ordered.

(2) The issues raised by Laclede in its September 27, 1977, filing would require Commission action which is in excess of its authority or which is inconsistent with the provisions of the Emergency Natural Gas Act of 1977 and orders issued pursuant thereto. The issues raised by Laclede in its September 27, 1977, filing are without merit.

The Commission Orders:

(A) MRT's application for rehearing is granted.

(B) The FPC's letter order of September 30, 1977, in this docket, is vacated.

(C) Alternate Original Sheet No. 3B to MRT's Gas Tariff, First Revised Volume No. 1 is accepted for filing effective October 1, 1977.

(D) This proceeding is terminated.

(E) Illinois Power Company is hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission: *Provided*, that participation by the specifically set forth in the petition to intervene: *Provided, further*, that the admission of petitioner shall not be construed as recognition by the Commission that petitioners might be aggrieved by any order or orders entered in this proceeding.

(f) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.
(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PIPELINE RATES:
[Rehearing, Emergency Natural Gas Act of 1977, Jurisdiction]

Before Commissioners:

Charles B. Curtis, Chairman; Georgiana Shelton and George R. Hall.

Mississippi River Transmission Corporation	) Docket No. RP72-149 (PGA77-10)

ORDER DENYING REHEARING,[1] DENYING MOTION TO STRIKE, AND GRANTING WAIVER OF REGULATIONS

(Issued April 24, 1978)

On March 29, 1978, Laclede Gas Company (Laclede) filed for rehearing of an order issue February 27, 1978, in the captioned docket granting rehearing of an application submitted by Mississippi River Transmission Corporation (MRT). The Commission reversed its prior order dated September 30, 1977, suspending a purchased gas adjustment (PGA) type filing by MRT; first because the Commission was without jurisdiction to suspend filings for

[1]Laclede in its filing questions whether rehearing lies to the February 27, 1978 order, which was itself an order on rehearing. Since that order reversed a prior Commission decision, thereby making Laclede an aggrieved party for the first time, rehearing must be sought under Section 19 of the Natural Gas Act prior to any request for judicial review. *Pan American Petroleum Corp.* v. *FPC*, 322 F.2d 999 (D.C. Cir. 1963).

the flow-through of costs incurred pursuant to the Emergency Natural Gas Act of 1977 (ENGA), and second, since the method of allocation of ENGA costs by MRT between its jurisdictional and nonjurisdictional customers was reasonable under ENGA and the Administrator's Order No. 7, no further proceedings were necessary and the flow-through was permitted.

On April 10, 1978, MRT filed a motion to strike the Laclede filing, or in the alternative, a request to waive the Regulations to permit a response to Laclede's petition for rehearing. MRT's motion to strike rests in the assertion that Laclede's filing is late under Section 1.34(d), but since we have determined that Laclede has filed a timely application for rehearing, MRT's motion to strike is denied. In order to avail all parties of a full opportunity to be heard, MRT's motion to waive Section 1.34(d) in order to permit the filing of a response to the Laclede petition will be granted.

Laclede asserts that the Commission erred in not requiring a hearing to investigate MRT's allocation of its ENGA charges. Laclede bases its request for rehearing on the argument that the Commission erred when it concluded that it has no jurisdiction to review the PGA-type flow-through, and that the Commission's determination to permit the pass-through was reached without reference to its appropriateness under Order No. 7 or MRT's tariff. Since this contention is incorrect, Laclede's petition for rehearing will be denied.

In its February 27, 1978 order, the Commission examined at great length two principal points. First, whether MRT was a proper party under ENGA to flow-through its emergency purchase costs and whether any

part of such costs could be disallowed by this Commission. We concluded that MRT was an eligible entity under ENGA and that ENGA mandated full recovery of all properly incurred costs. We do not understand Laclede to argue otherwise.

The second conclusion of the Commission, however, is disputed by Laclede, and that is the propriety of MRT's allocation of its ENGA costs to its jurisdictional purchasers, such as Laclede. Contrary to Laclede's argument, the Commission carefully reviewed the MRT submission, with specific reference to Order No. 7.[2] The Commission found that:

> [o]ur review of the MRT rate filings and the other filings in this docket results in the conclusion that the company's method of allocation, which was, in our judgment, consistent with Order No. 7, properly assigned to its jurisdictional customers a reasonable level of costs.[3]

Thus, as opposed to Laclede's claim that the Commission denied its jurisdiction to review the appropriateness of the MRT allocation, the Commission clearly did assert such jurisdiction by making the aforementioned analysis under Order No. 7. Laclede may disagree with the Commission's conclusion, but the company's claim on rehearing that the Commission improperly failed to exercise its jurisdiction is plainly incorrect.

[2]*See* mimeo pp. 9–12 of the February 27, 1978 order.

[3]*Id.* at p. 11.

According to Laclede, if the Commission had acted correctly, it should have ordered a hearing to be held because "Laclede *believes* that MRT has over-allocated the costs of ENGA gas to its on-system sales by allocating no part of those ENGA costs to its off-system sales." (emphasis added).[4] In its order of February 27, 1978, the Commission noted that MRT was billed $8,105,866 for ENGA purchases. Of that amount, $2,189,012 was assigned to nonjurisdictional customers ($1,938,960 direct sales plus $250,052 nonjurisdictional storage injection). Again, Laclede has misinterpreted the Commission order when it asserts that MRT failed to allocate *any* ENGA costs to off-system customers.

Laclede then makes reference to certain exchange and sales arrangements with off-system customers by way of an offer of proof that MRT's allocation of ENGA costs is suspect, thereby requiring an evidentiary hearing. Laclede notes that MRT's latest Form 16 filing, dated October 14, 1977, describes an exchange agreement with Natural Gas Pipeline Company of America (Natural) that had an imbalance of deliveries during July of 1977. From this, Laclede apparently asserts that this "sale" would not have been possible without the earlier ENGA purchases and that Natural should therefor bear some portion of the ENGA costs allocated to MRT by United. Laclede makes a similar claim with respect to a 60-day emergency sale from MRT to Natural in August and September of 1977.

In reply, MRT points out that the arrangement Laclede characterizes as a "sale" is really an exchange agreement, certificated by the Commission,[5] that facilitates the delivery to MRT of the production from a self-help exploration and development measure. The delivery imbalance referred to by Laclede for July of 1977 was

[4]Application for Rehearing, p. 8.

[5]Docket Nos. CP75-224, *et al.* (June 19, 1975).

repaid by the end of that summer season. At no time was any of this company owned gas sold to Natural. As to the 60-day sale, MRT states that this sale was commenced after the ENGA deliveries from United had ceased and that the source of supply was completely different.

We have reviewed Laclede's arguments on rehearing in the context of a further analysis of the MRT filing approved in our February 27, 1978 order. Petitioner has raised no new facts or legal principles that require the modification of the February 27, 1978 order. Accordingly, we will deny Laclede's application for rehearing in its entirety.

The Commission Finds:

(1) The Laclede application for rehearing of the order in this proceeding issued February 27, 1978 should be denied.

(2) The MRT motion to strike should be denied. The alternative MRT motion to waive Section 1.34(d) of the Commission's Regulations to permit the filing of a response to the Laclede application for rehearing should be granted.

The Commission Orders:

(A) The application for rehearing filed by Laclede is denied.

(B) The motion of MRT to strike is denied. The motion of MRT to waive Section 1.34(d) of the Commission's Regulations is granted.

By the Commission.
(S E A L)

Kenneth F. Plumb,
Secretary.

APPENDIX C

APPENDIX C

Relevant Statutory Provisions.

PUBLIC LAW 95-2 [S.474]; Feb. 2, 1977

EMERGENCY NATURAL GAS ACT OF 1977

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Emergency Natural Gas Act of 1977".

Emergency Natural Gas Act of 1977.
15 USC 717 note.

DEFINITIONS

Sec. 2. As used in this Act: 15 USC 717 note.

(1) The term "high-priority use" means

(A) use of natural gas in a residence;

(B) use of natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day; or

(C) any other use of natural gas the termination of which the President determines would endanger life, health, or maintenance or physical property.

(2) The term "interstate pipeline" means any natural-gas company, as defined in section 2(6) of the Natural Gas Act, which is engaged in the transportation by pipeline of natural gas. 15 USC 717a.

(3) The term "intrastate pipeline" means any person (other than an interstate pipeline) engaged in the transportation by pipeline of natural gas.

(4) The term "interstate natural gas" means natural gas (other than natural gas transported pursuant to a transportation certificate issued under 18 C.F.R. 2.79) transported by an interstate pipeline in a facility which is certificated under the Natural Gas Act or which would be required to be so certificated but for section 1(c) of such Act. 15 USC 717w. 15 USC 717.

(5) The term "local distribution company" means any person (including a governmental entity) which receives natural gas for local distribution and resale to natural gas users.

(6) The term "antitrust laws" means the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12, 13, 14–19, 20, 21, 22–27), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8–9), and the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a), and similar State laws.

(7) The term "State" means any State of the United States and the District of Columbia.

PRESIDENTIAL DECLARATION

Natural gas emergency. 15 USC 717 note.

Sec. 3. The President may declare a natural gas emergency if he finds that a

severe natural gas shortage endangering the supply of natural gas for high-priority uses exists or is imminent in the United States or in any region thereof and that the exercise of his authorities under section 4 is reasonably necessary, having exhausted other remedies to the maximum extent practicable, to assist in meeting requirements for such uses. Such emergency shall be terminated when the President finds that such shortages no longer exist and are no longer imminent.

Termination.

EMERGENCY DELIVERIES AND TRANSPORTATION OF NATURAL GAS

Sec. 4. (a)(1) If the President finds it necessary to assist in meeting the requirements for high-priority uses of natural gas (including short-term storage replenishment or injection for protection of high-priority uses), on the basis of a notification by the Governor of any State pursuant to subsection (c) or on the basis of other information available to the President, the President may, during a natural gas emergency declared under section 3, by order, require—

15 USC 717 note.

Requirements for delivery by interstate or intrastate pipelines.

(A) any interstate pipeline to make emergency deliveries of, or to transport, interstate natural gas to any other interstate pipeline or to any local distribution company served by an interstate pipeline for purposes of meeting such requirements;

(B) Any intrastate pipeline to transport interstate natural gas from any interstate pipeline to another interstate pipeline or to any local distribution company served by an interstate pipeline for purposes of meeting such requirements; or

(C) the construction and operation by any pipeline of any facilities necessary to effect such deliveries or transportation.

No such delivery or transportation may continue after April 30, 1977, or after the President terminates the emergency declared under section 3, whichever is earlier.

Order, restrictions.

(2) No order may be issued under this subsection unless the President determines that such order will not—

(A) create for the interstate pipeline delivering interstate natural gas a supply shortage which will cause such pipeline to be unable to meet the requirements for highpriority uses served, directly or indirectly, by such pipeline;

(B) result in a disproportinate share of deliveries or curtailments of natural gas experienced by such interstate pipeline when compared to deliveries and resulting curtailments which are experienced as a result of orders applicable to other interstate pipelines (as determined by the President); and

(C) require transportation of natural gas by any pipeline in excess of its available transportation capacity.

(3) In issuing such order the President shall also consider the relative availability of alternatent of electric power is supplied by nuclear power in Japan.

Alternative fuel, availability.

(b) Compliance by any pipeline with an order issued under subsection (a) shall not subject such pipeline to regulation under the Natural Gas Act (15 U.S.C. 717 et seq.) or to regulation as a common carrier under any provision of State or Federal law. No action required to be taken under an order issued under subsection (a) shall be subject to any provision of the Natural Gas Act and any such order shall supersede any provision of a certification, or other requirement, under the Natural Gas Act which is inconsistent with such order.

(c)(1) The Governor of any State may notify the President of any finding by such Governor that a shortage of natural gas within such State, endangering the supply of natural gas for high-priority uses, exists or is imminent and that the State, and agencies and instrumentalities thereof, have exercised their authority to the fullest extent practicable and reasonable under the circumstances to overcome such shortage.

Notification of shortage by State Governor.

(2) The Governor shall submit, together with any notification under paragraph

(1), information upon which he has based his finding under such paragraph, including—

(A) volumes of natural gas required to meet the requirements for high-priority uses in such State;

(B) information received from persons in the business of producing, selling, transporting, or delivering natural gas in such State as to the volumes of natural gas available in such State; and

(C) such other information as the Governor determines appropriate to apprise the President of emergency deliveries and transportation of interstate natural gas needed in such State.

(d) The President may request that representatives of interstate pipelines, intrastate pipelines local distribution companies, and other persons meet and provide assistance to the President in carrying out his authority under this section.

Authority to obtain information.

(e)(1) In order to obtain information to carry out his authority under this Act, the President may—

(A) sign and issue subpenas for the attendance and testimony of witnesses

and the production of books, records, papers, and other documents;

(B) require any person, by general or special order, to submit answers in writing to interrogatories, requests for reports or for other information, and such answers shall be made within such reasonable period, and under oath or otherwise, as the President may determine; and

(C) secure, upon request, any information from any Federal department or executive agency.

(2) The appropriate United States district court may, upon petition of the Attorney General at the request of the President, in the case of refusal to obey a subpena or order of the President issued under this subsection, issue an order requiring compliance therewith, and any failure to obey an order of the court may be punished by the court as a contempt thereof.

Compliance order.

(f)(1) If the parties to any order issued under subsection (a) fail to agree upon the terms of compensation for deliveries (which may include compensation in kind) or transportation required pursuant to such order, the President, after a hearing held either before or after such order takes effect, shall, by supplemental order, prescribe the amount of compensation (which may in-

Compensation. Hearing; supplemental order.

clude compensation in kind) to be paid for such deliveries or transportation and for any other expenses incurred in delivering or transportating such gas.

(2) If, for the purpose of a supplemental order pursuant to paragraph (1), the party making emergency deliveries pursuant to subsection (a)—

(A) indicates a preference for compensation in kind, the President shall direct that compensation in kind be provided by August 1, 1977, to the maximum extent practicable,

(B) indicates a preference for compensation, or the President determines pursuant to paragraph (A) of this subsection that any portion thereof cannot practicably be compensated in kind, the President shall calculate the amount of compensation for deliveries of natural gas, based upon the amount required to make the interstate pipeline delivering such natural gas and its local distribution companies whole for loss of sales resulting therefrom; including the actual amount paid by such interstate pipeline or any of its local distribution companies for the volumes of natural gas or higher cost gas such as synthetic natural gas which were needed

to replace natural gas delivered pursuant to an order under subsection (a); and for transportation, storage, and other expenses, based upon reasonable costs, as determined by the President.

Delivery to high priority users only.

(g) In order to effect the purposes of this Act, the President shall monitor the operation of any order made pursuant to this section to assure that natural gas delivered pursuant to this section is applied to high-priority uses only.

ANTITRUST PROTECTIONS

15 USC 717 note.

Sec. 5. (a) There shall be available as a defense for any person to civil or criminal action brought for violation of the antitrust laws (or any similar law of any State) with respect to any action taken or meeting held pursuant to a request or order of the President under section 4(a) or (d) of this Act, if—

(1) such action was taken or meeting held solely for the purpose of complying with the President's request or order;

(2) such action was not taken for the purpose of injuring competition; and

(3) such person complied with the

requirements of subsection (b) of this section.

Persons interposing the defense provided by this subsection shall have the burden of proof, except that the burden shall be on the person against whom the defense is asserted with respect to whether the actions were taken for the purpose of injuring competition.

(b) A meeting held pursuant to a request by the President under section 4(d) or pursuant to an order under section 4(a) complies with the requirements of subsection (a) if—

(1) There is present at such meeting a full-time Federal employee designated for such purposes by the Attorney General;

(2) a full and complete record of such meeting is taken and deposited, together with any agreements resulting therefrom, with the Attorney General, who shall make it available for public inspection and copying;

(3) the Attorney General and the Federal Trade Commission have the opportunity to participate from the beginning in the development and

carrying out of agreements and actions under sections 4(a) and 4(d), in order to propose any alternative which would avoid or overcome, to the greatest extent practicable, possible anticompetitive effects while achieving substantially the purposes of this Act; and

(4) such other procedures as may be specified in such request or order are complied with.

EMERGENCY PURCHASES

Sec. 6. (a) The President may authorize any interstate pipeline or local distribution company served by an interstate pipeline (or class or category of such pipelines or companies) to contract, upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for emergency supplies of natural gas for delivery before August 1, 1977— 15 USC 717 note.

(1) from any producer of natural gas (other than a producer who is affiliated with the purchaser as determined by the President) if (A) such natural gas is not produced from the Outer Continental Shelf and (B) the sale or transportation of such gas was

not, immediately before the date on which such contract was entered into, certificated under the Natural Gas Act, or 15 USC 717w.

(2) from any intrastate pipeline, local distribution company, or other person (other than in interstate pipeline or a producer of natural gas).

Emergency purchase contract; court approval.

The president may not authorize any emergency purchase contract under this subsection for emergency supplies of natural gas for sale and delivery from any intrastate pipeline which is operating under court supervision as of January 1, 1977, unless the court approves. 15 USC 717w.

(b)(1) The provisions of the Natural Gas Act shall not apply—

(A) to any sale of natural gas to an interstate pipeline or local distribution company under the authority of subsection (a) or to any transportation by an intrastate pipeline in connection with any such sale; or

(B) to any natural gas company (within the meaning of the Natural Gas Act) solely by reason of any such sale or transportation.

(2) In exercising its authority under the Natural Gas Act, the Federal Power

Commission shall not disallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported, or other costs incurred pursuant to subsection (a).

(c)(1) The President may, by order, require any pipeline to transport such natural gas, and to construct and operate such facilities for transportation of natural gas, as may be necessary to carry out contracts authorized under subsection (a). The costs of any such required construction shall be paid by the party receiving such natural gas. No such order shall require any pipeline to transport any natural gas in excess of such pipeline's available capacity.

(2) Compliance by any pipeline with any order under this subsection shall not subject such pipeline to regulation under the Natural Gas Act or to regulation as a common carrier under any provision of State law.

"Outer Continental Shelf"

(d) As used in this section, the term "Outer Continental Shelf" has the same meaning as such term has under section 2 of the Outer Continental Shelf Lands Act (43 U.S.C. 1331).

ADJUSTMENT IN CHARGES FOR LOCAL DISTRIBUTION COMPANIES

15 USC 717 note.

Sec. 7. Compensation received by an interstate pipeline pursuant to section 4 in excess of the amount such pipeline would have charged its local distribution companies shall be credited to such local distribution companies in proportion to their share of any natural gas not delivered together with credits necessary to make whole any local distribution company which replaced such natural gas with higher cost gas such as synthetic natural gas as prescribed in section 4(f)(2)(B). Compensation paid by an interstate pipeline for deliveries or emergency purchases of natural gas pursuant to section 4 or section 6 shall be charged to such interstate pipeline's local distribution companies in proportion to their share of such natural gas deliveries or purchases.

RELATIONSHIP TO NATURAL GAS ACT

15 USC 717 note.

Sec. 8. Except as expressly provided in this Act, nothing contained in this Act shall be interpreted to change, modify, or otherwise affect rules, regulations, or other regulatory requirements or procedures of the Federal Power Commission pursuant to the provisions of the Natural Gas Act.

15 USC 717w.

EFFECT OF CERTAIN CONTRACTUAL OBLIGATIONS

15 USC 717 note.

Sec. 9. (a) There shall be available as a defense to any action brought for breach of contract under Federal or State law arising out of any act or omission that such act was taken or that such omission occurred for purposes of complying with any order issued under section 4(a).

(b) Any contractual provision—

Prohibition of sale or commingling of natural gas.

(1) prohibiting the sale or commingling of natural gas subject to such contract with natural gas subject to the provisions of the Natural Gas Act, or

(2) terminating any obligation under any such contract as a result of such sale or commingling,

is hereby declared against public policy and unenforceable with respect to such natural gas if an order under section 4(a) or an authorization under section 6(a) applies to the delivery, transportation, or contract for supplies of such natural gas.

(c) The amounts and prices of any natural gas purchases pursuant to an order under section 4(a), an authorization under section 6(a), or a contract entered into pursuant to 18 C.F.R. 2.68 after the date of the enactment of this Act and before August 1, 1977, shall not be taken into account for

purposes of any contractual provision which determines the price of any natural gas (or terminates the contract for the sale of natural gas) on the basis of sales of other natural gas.

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

15 USC 717 note.
15 USC 551.

Sec. 10. (a) Subchapter II of chapter 5 title 5 of the United States Code (other than sections 554, 556, and 557 thereof) shall apply to orders and other actions under this Act.

(b) Except with respect to enforcement of orders or subpenas under section 4(e), the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended, shall have exclusive original jurisdiction to review all civil cases and controversies under this Act, including any order issued, or other action taken, under this Act. The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under section 4(e) of this Act; such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

12 USC 1904 note.

Filing of notice of appeal.

(c) Prior to a final judgment, no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order issued, or action taken, by the President under this Act.

ENFORCEMENT

15 USC 717 note.

Sec. 11. (a) Any person who violates an order or supplemental order issued under section 4 or an order section 6(c) shall be subject to a civil penalty of not more than $25,000 for each violation of such order. Each day of violation shall constitute a separate offense.

(b) Any person who willfully violates an order or supplemental order issued under section 4 or an order under section 6(c) shall be fined not more than $50,000 for each violation of such order. Each day of violation shall constitute a separate violation.

(c) Whenever it appears to the President that any individual or organization has engaged, is engaged, or is about to engage in acts or practices constituing a violation of any order issued under section 4(a), any supplemental order issued under section 4(f), or any order under section 6(c), the President may request the Attorney General to bring a civil action to enjoin such acts or practices and, upon showing, a temporary

Mandatory injunctions.

restraining order or preliminary or permanent injunction shall be granted without bond. In any such action, the court may also issue mandatory injunctions commanding any person to comply with any such order or supplemental order.

REPORTING

Report to President. 15 USC 717 note.

Sec. 12. (a) In issuing any order under section 4(a) or granting any authorization under section 6, the President shall require that the prices and volumes of natural gas delivered, transported, or contracted for pursuant to such order or authorization shall be reported to him on a weekly basis and such reports shall be made available to the Congress.

Report to Congress.

(b) The President shall report to Congress not later than October 1, 1977, respecting his actions under this Act.

DELEGATION OF AUTHORITIES

15 USC 717 note.

Sec. 13. The President may delegate all or any portion of the authority granted to him under this Act to such executive agencies (within the meaning of 5 U.S.C. 105) or officers of the United States as he determines appropriate, and may authorize such redelegation as may be appropriate. Except with respect to section 552 of title 5 of the United States Code, any officer or

executive agency of the United States to which authority is delegated or redelegated under this Act shall be subject only to such procedural requirements respecting the exercise of such authority as the President would be subject to if such authority were not so delegated.

PREEMPTION OF INCONSISTENT STATE OR LOCAL ACTION

Sec. 14. Any order issued pursuant to this Act shall preempt any provision of any program for the allocation, emergency delivery, transportation, or purchase of natural gas established by any State or local government if such program is in conflict with any such order. 15 USC 717 note.

Approved February 2, 1977.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-7 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 123 (1977):

Jan. 26, 28, 31, considered and passed Senate.
Feb. 1, considered and passed House, amended.
Feb. 2, Senate and House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 13, No. 6:

Feb. 2, President statement.

NATURAL GAS ACT
Sections 1, 4 and 19, 15 U.S.C. §§ 717, 717c and 717r

§ 717. Necessity for Regulation of Natural Gas Companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed with such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.

The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Fedeal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

§ 717c. Rates and Charges; Schedules; Suspension of New Rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in

convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classification, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a

statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 717r. Rehearings; Court Review of Orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such applicationis based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the

Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the

Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

NATURAL GAS POLICY ACT
Sections 301, 302, 506(c), 601, 15 U.S.C.A. §§ 3361, 3362, 3416(c), 3431

TITLE III—ADDITIONAL AUTHORITIES AND REQUIREMENTS

Subtitle A—Emergency Authority

SEC. 301. DECLARATION OF EMERGENCY.

(a) Presidential Declaration.—The President may declare a natural gas supply emergency (or extend a previously declared emergency) if he finds that—

(1) a severe natural gas shortage, endangering the supply of natural gas for high-priority uses, exists or is imminent in the United States or in any region thereof; and

(2) the exercise of authorities under section 302 or section 303 is reasonably necessary, having exhausted other alternatives to the maximum extent practicable, to assist in meeting natural gas requirements for such high-priority uses.

(b) Limitation.—

(1) Expiration.—Any declaration of a natural gas supply emergency (or extension thereof) under subsection (a), shall terminate at the earlier of—

(A) the date on which the President finds that any shortage described in subsection (a) does not exist or is not imminent; or

(B) 120 days after the date of such declaration of emergency (or extension thereof).

(2) Extensions.—Nothing in this subsection shall prohibit the President from extending, under subsection (a), any emergency (or extension thereof), previously declared under subsection (a), upon the expiration of such declaration of emergency (or extension thereof) under paragraph (1)(B).

SEC. 302. EMERGENCY PURCHASE AUTHORITY.

(a) Presidential Authorization.—During any natural gas supply emergency declared under section 301, the President may, by rule or order, authorize any interstate pipeline or local distribution company served by any interstate pipeline to contract, upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for the purchase of emergency supplies of natural gas—

(1) from any producer of natural gas (other than a producer who is affiliated with the purchaser, as determined by the President) if—

(A) such natural gas is not produced from the Outer Continental Shelf; and

(B) the sale or transportation of such natural gas was not pursuant to a certificate issued under the Natural Gas Act immediately before the date on which such contract was entered into; or

(2) from any intrastate pipeline, local distribution company, or other person (other than an interstate pipeline or a producer of natural gas).

(b) Contract Duration.—The duration of any contract authorized under subsection (a) may not exceed 4

months. The preceding sentence shall not prohibit the President from authorizing under subsection (a) a renewal of any contract, previously authorized under such subsection, following the expiration of such contract.

(c) Related Transportation and Facilities.'The President may, by order, require any pipeline to transport natural gas, and to construct and operate such facilities for the transportation of natural gas, as he determines necessary to carry out any contract authorized under subsection (a). The costs of any construction or transportation ordered under this subsection shall be paid by the purchaser of natural gas under the contract with respect to which such order is issued. No order to transport natural gas under this subsection shall be paid by the purchaser of natural gas under the contract with respect to which such order is issued. No order to transport natural gas under this subsection shall require any pipeline to transport natural gas in excess of such pipeline's available capacity.

(d) Maintenance of Adequate Records.—The Commission shall require any interstate pipeline or local distribution company contracting under the authority of this section for natural gas to maintain and make available full and adequate records concerning transactions under this section, including records of the volumes of natural gas purchased under the authority of this section and the rates and charges for purchase and receipt of such natural gas.

(e) Special Limitation.—No sale under any emergency purchase contract under this section for emergency supplies of natural gas for sale and delivery from any intrastate pipeline which is operating under court

supervision as of January 1, 1977, may take effect unless the court approves.

SEC. 506. JUDICIAL REVIEW

(c) Judicial Review of Emergency Orders.—Except with respect to enforcement of orders or subpenas under section 304(a), the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabiliation Act of 1970, as amended, shall have exclusive original jurisdiction to review all civil cases and controversies under section 301, 302, or 303, including any order issued, or other action taken, under such section. The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under section 304(a)(2); such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days after the entry of judgment by the district court. Prior to a final judgment, no court shall have jurisdiction to grant any injunctive relief to stay or defer the implementation of any order issued, or action taken, under section 301, 302, or 303.

TITLE VI—COORDINATION WITH NATURAL GAS ACT; MISCELLANEOUS PROVISIONS

SEC. 601. COORDINATION WITH THE NATURAL GAS ACT.

(a) Jurisdiction of the Commission Under the Natural Gas Act.—

(1) Sales.—

(A) Natural Gas Not Committed Or Dedicated.—For purposes of section (b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of enactment of this Act solely by reason of any first sale of such natural gas.

(B) Committed Or Dedicated Natural Gas.—Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is—

(i) high-cost natural gas (as defined in section 107(c)(1), (2) (3), or (4) of this Act);

(ii) new natural gas (as defined in Section 102(c) of this Act); or

(iii) natural gas produced from any new, onshore production well (as defined in section 103(c) of this Act).

(C) Authorized Sales Or Assignments.—For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas—

(i) authorized under section 302(a) or 311(b); or

(ii) pursuant to any assigned authorized under section 312(a).

(D) Natural-Gas Company.—For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

(E) Alaskan Natural Gas.—Subparagraph (B) (ii) and (iii) shall not apply with respect to natural gas produced from the Prudhoe Bay unit of Alaska and transported through the transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(2) Transportation.—

(A) Jurisdiction of the Commission.—For purposes of section 1(b) of the Natural Gas Act the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is—

(i) pursuant to any order under section 302(c) or section 303 (b), (c), (d), or (h) of this Act; or

(ii) authorized by the Commission under section 311(a) of this Act.

(B) Natural-Gas Company.—For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) Charges Deemed Just and Reasonable.—

(1) Sales.—

(A) First Sales.—Subject to paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if—

(i) such amount does not exceed the applicable maximum lawful price established under title I of this Act; or

(ii) there is no applicable maximum lawful price solely by reason of the elimination of price controls pursuant to subtitle B of title I of this Act.

(B) Emergency Sales.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized under section 302(a) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established under such section and applicable to such sale.

(C) Sales by Intrastate Pipelines.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized by the Commission under section 311(b) shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) Assignments.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid pursuant to the terms of any contract with respect to that portion of which the Commission has authorized an assignment authorized under section 312(a) shall be deemed to be just and reasonable if such amount does not exceed the applicable maximum lawful price established under title I of this Act.

(E) Affiliated Entities Limitation.—For purposes of paragraph (1), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of such paragraph, such amount does not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline.

(2) Other Charges.—

(A) Allocation.—For purposes of section 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 303 (b), (c), or (d) of this Act shall be deemed to be just and reasonable if such amount is prescribed by the President under section 303(h)(1).

(B) Transportation.—For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for any transportation authorized by the Commission under section 311(a) of this Act shall be deemed to be just and reasonable if such amount does not exceed that approved by the Commission under such section.

(c) Guaranteed Passthrough.—

(1) Certificate May Not be Denied Based Upon Price.—The Commission may not deny, or condition

the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) Recovery of Just and Reasonable Prices Paid.—For purposes of sections 4 and 5 of the Natural Gas Act, the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if—

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, and

(B) such recovery is not inconsistent with any requirement of any rule under section 201 (including any amendment under section 202),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

No. 79-321

In the Supreme Court of the United States

OCTOBER TERM, 1979

LACLEDE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-321

LACLEDE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-4) is not yet reported. The opinion and order of the Federal Energy Regulatory Commission (Pet. App. A-14 to A-31) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A petition for rehearing was denied on May 30, 1979 (Pet. App. A-5, A-6). The petition for a writ of certiorari was filed on August 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order of the Federal Energy Regulatory Commission approving an interstate natural gas pipeline's tariff filing under Order No. 7 of the Administrator of the Emergency Natural Gas Act of 1977 is reviewable exclusively in the Temporary Emergency Court of Appeals.

STATUTES INVOLVED

Sections 3, 4, 6, 10 and 13 of the Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, 91 Stat. 5-10, 15 U.S.C. (Supp. I) 717 note, are set forth at Pet. App. A38-A56; Section 4 of the Natural Gas Act of 1938, 15 U.S.C. 717c, is set forth at Pet. App. A57-A60.

STATEMENT

The Emergency Natural Gas Act of 1977 (ENGA), Pub. L. No. 95-2, 91 Stat. 4, 15 U.S.C. (Supp. I) 717 note, temporarily[1] empowered the President to order the emergency delivery and transportation of natural gas. Under Section 6 the President could authorize any interstate pipeline or local distribution company to contract for emergency supplies of natural gas for delivery before August 1, 1977, from any producer of natural gas, intrastate pipeline or local distribution company. Section 6(b) exempted such contracts from the Natural Gas Act, 15 U.S.C. 717 *et seq.*, and required the Federal Power Commission to permit the pass-through of purchase and transportation costs under ENGA (Pet. App. A48-A50).

[1]President Carter declared a natural gas emergency under the terms of the ENGA the day it was enacted, February 2, 1977 (Proc. No. 4485, 42 Fed. Reg. 6789) and declared the emergency terminated on April 1, 1977 (Proc. No. 4495, 42 Fed. Reg. 18053).

Section 13 of ENGA permitted the President to delegate the authority granted to him under ENGA to other officers of the United States. By Executive Order No. 11969, 42 Fed. Reg. 6791 (1977), the President designated the Chairman of the Federal Power Commission as Administrator of the Act. The Administrator issued Order No. 7, 42 Fed. Reg. 22146 (1977), establishing rules for the allocation of charges paid for purchases and deliveries under Section 6 of ENGA. Section 10(b) of ENGA vested "exclusive original jurisdiction to review all civil cases and controversies under [the] Act" in the Temporary Emergency Court of Appeals (Pet. App. A53).

Between February 1977 and July 1977, United Gas Pipeline Company, an interstate pipeline, purchased gas under Section 6 of ENGA from various intrastate pipelines, and delivered that gas to its customers, one of which was another interstate pipeline, Mississippi River Transmission Corporation (MRT). United passed on to MRT the purchase costs it had incurred for the volumes delivered.

On August 31, 1977, MRT, in turn, filed with the Federal Power Commission[2] in Docket No. RP72-149 (PGA 77-10) tariff sheets passing on those purchase costs to MRT's wholesale customers. One of those customers,

[2]Pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.*, the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions and regulatory responsibilities, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission effective October 1, 1977. Hereinafter, the term "Commission" refers to the FPC or the FERC depending on whether the events referred to occurred before or after October 1, 1977.

Laclede Gas Company, petitioner here, protested, and by order of September 30, 1977, the Commission suspended the filing and set it for hearing under Section 4 of the Natural Gas Act, 15 U.S.C. 717c (Pet. App. A15-A16).

MRT sought rehearing of the September 30 order on the ground that under Section 6 of ENGA and Order No. 7 thereunder, pass-through of the emergency purchase gas cost was automatic. The Commission agreed that MRT's filing complied with the requirements of Section 6 of ENGA and Order No. 7, and that the Commission was therefore required by Section 6(b)(2) of ENGA to permit the pass-through (Pet. App. A14-A31). Section 6(b)(2) provides:

> In exercising its authority under the Natural Gas Act, the Federal Power Commission shall not disallow, in whole or in part, recovery by any interstate pipeline, through the rates and charges made, demanded, or received by such pipeline, the amounts actually paid by it for natural gas purchased, transported or other costs incurred [for emergency purchases authorized by the President under Section 6(a)].

The Commission therefore vacated its order setting the matter for hearing, accepted MRT's tariff, and terminated the proceeding (Pet. App. A14-A31).

Laclede filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). That court dismissed the petition on the ground that "petitioner's suit arises under the Emergency Natural Gas Act of 1977 * * * and in accordance with §10(b) of the Act, is within the exclusive jurisdiction of the Temporary Emergency Court of Appeals * * *" (Pet. App. A3).

ARGUMENT

The decision of the court of appeals is correct. There is no conflict concerning the relative jurisdictions of the courts of appeals and the Temporary Emergency Court of Appeals with respect to issues arising under the Emergency Natural Gas Act. Moreover, because ENGA was a temporary statute that is no longer effective, the issue is not of current importance. Accordingly, review by this Court is not warranted.

The court of appeals correctly held that this case arises under ENGA. "For purposes of determining TECA jurisdiction, what is determinative is not whether an [ENGA] question exists, but whether an [ENGA] question has been adjudicated." *Texaco, Inc.* v. *Dept. of Energy, et al*, TECA No. DC-52 (Oct. 15, 1979), slip op. 10; Accord, *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, No. 79-7330 (2d Cir. Aug. 1, 1979), slip op. 4022. Cf. *Bray* v. *United States*, 423 U.S. 73 (1975). In this case the Commission adjudicated a question under ENGA. It held that MRT's purchases of emergency gas from United were subject to the provisions of ENGA and Order No. 7 of the ENGA Administrator, and that the Commission was therefore required by Section 6 of ENGA to accept the tariff. Even though the filing was in form submitted to the Commission under Section 4 of the Natural Gas Act, the validity of that filing depended solely upon construction of Section 6 of ENGA and the Administrator's Order No. 7 thereunder. The Commission's decision, which we believe correct, was in any event the adjudication of a question under the ENGA, and therefore reviewable only in TECA.

Lo-Vaca Gathering Company v. *Railroad Commission of Texas*, 565 F. 2d 144 (T.E.C.A. 1977), is not to the contrary. In that case the appellant sought TECA review of an order of a state utility commission that the appellant claimed was in conflict with ENGA but which was not an order based on ENGA and that did not adjudicate any question under ENGA. TECA held that it lacked jurisdiction, explaining that its jurisdiction under ENGA, like its jurisdiction under Section 211 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, was limited to "review of federal administrative decisions, or action taken under the Act," 565 F. 2d at 147, and did not include jurisdiction to review "an original complaint challenging an order of a state regulatory commission" (*id.* at 148).[3] In this case, in contrast, the order of the Commission challenged by petitioner was based on ENGA and it adjudicated a question under ENGA. The Commission acted pursuant to its express obligation under Section 6(b) of ENGA to "not disallow" the

[3]In *Lo-Vaca*, the court also stated later in its opinion that its jurisdiction was limited to "review of action taken by the Administrator under the [ENGA]" (565 F. 2d at 148), but the court clearly did not intend to exclude actions taken by the Commission under ENGA, which were not involved in that case. The court's reliance on the parallel jurisdictional provision of Section 211 of the Economic Stablization Act indicates that the court had no such intention, because TECA and other courts have held that the "Power Commission orders which raise Economic Stablization issues are exclusively reviewable in the District Court, with review in [TECA]." *City of Groton* v. *FPC*, 487 F. 2d 927, 935 (T.E.C.A. 1973); see also *Municipal Intervenors Group* v. *FPC*, 473 F. 2d 84, 90 (D.C. Cir. 1972). The only difference between the Economic Stabilization Act and ENGA is that under Section 10(b) of ENGA, "TECA has replaced the district court as the court of first resort." *Lo-Vaca Gathering Company* v. *Railroad Commission of Texas, supra*, 565 F. 2d at 146.

recovery of charges paid for emergency gas purchased authorized by ENGA, and its action was thus a federal administrative decision taken under that Act.

Finally, the issue is not of current significance. The natural gas emergency declared by the President on February 2, 1977, under Section 3 of ENGA (Proc. No. 4485, 42 Fed. Reg. 6789) was terminated on April 1, 1977 (Proc. No. 4495, 42 Fed. Reg. 18053), and authority for emergency gas purchases under Section 6 expired August 1, 1977. Petitioner notes (Pet. 10) that Title III of the Natural Gas Policy Act of 1978 (NGPA), Pub. L. No. 95-621, 92 Stat. 3381-3388, reenacts the substantive provisions of ENGA, and that Section 506(c) of NGPA (92 Stat. 3405) reenacts Section 10(b) of ENGA. This emergency authority, however, is now in stand-by status, and it does not appear likely that the President will be required to declare a natural gas emergency in the near future.[4]

[4]There is no merit to petitioner's further contention that the court of appeals decision rests upon grounds not invoked by the Commission, in contravention of the principle of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). The Commission plainly based its decision on Section 6 of ENGA and Order No. 7 thereunder (Pet. App. A18-A29). Whether jurisdiction over the review proceeding rested in TECA or the court of appeals presented a judicial question to be decided in the first instance by the court of appeals, not by the Commission. The statement of the Commission's counsel in its brief in the court of appeals that the court had jurisdiction under Section 19(b) of the Natural Gas Act was not a matter that the Commission had decided, and thus *Chenery* requires no remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents.

BRIEF OF MISSISSIPPI RIVER TRANSMISSION CORPORATION IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI

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BRIEF OF MISSISSIPPI RIVER TRANSMISSION CORPORATION IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI

Respondent Mississippi River Transmission Corporation ("MRTC") hereby files in opposition to the petition for a writ of certiorari filed in this cause by Laclede Gas Company ("Laclede" or "Petitioner") on August 28, 1979.

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit properly ruled that it lacked jurisdiction to review orders of the Federal Energy Regulatory Commission ("Commission")[1] issued as the result of authority delegated to it pursuant to the Emergency Natural Gas Act of 1977 ("ENGA"),[2] which act vests exclusive jurisdiction to review orders issued under it in the Temporary Emergency Court of Appeals ("TECA"), where the orders of the Commission properly made clear that it was judging the issues involved under the standards of ENGA and the ENGA Administrator's Order No. 7[3] and not under the standards of the Natural Gas Act ("NGA").[4]

STATEMENT OF THE CASE

MRTC is an interstate "natural gas company" as defined in the Natural Gas Act, subject to regulation by the Commission with respect to many of its activities. Laclede is MRTC's largest jurisdictional customer. MRTC purchases over half of its total gas supply from United Gas Pipe Line Company ("United"), another interstate pipeline regulated by the Commission, which had been sharply curtailing service because of a severe gas supply shortage on its system

[1]Hereinafter, the term "Commission" shall be read as referring both to the Federal Energy Regulatory Commission and its predecessor agency, the Federal Power Commission.

[2]Pub. L. No. 95-2, 91 Stat. 4 (1977).

[3]42 Fed. Reg. 22146 (May 2, 1977).

[4]15 U.S.C. § 717.

for a number of years even before the onset of the bitterly cold 1976–77 winter.

During 1977, United purchased natural gas supplies pursuant to the provisions of the ENGA and flowed the costs of these emergency purchases through to its customers (including MRTC) pursuant to the ENGA Administrator's Order No. 7. In Order No. 7, the Administrator prescribed precise procedures to be utilized by interstate pipelines for the recovery of ENGA costs and, in certain circumstances, permitted pipelines to select one of two specified methods of recovery. Having paid United its ENGA costs, MRTC then made a filing in strict conformity with the Administrator's Order No. 7 to flow-through to its customers (including Laclede) amounts it had paid United. Because of the cost recovery method employed by MRTC under the Administrator's Order No. 7, MRTC was required to set forth charges determined in accordance with Order No. 7 procedures in tariff sheet form and file the same with the Commission for review as to compliance with Order No. 7.

Laclede intervened and sought to have the Commission review MRTC's ENGA cost recoupment filing under the substantive and procedural standards of the Natural Gas Act and not under those of ENGA and the ENGA Administrator's Order No. 7. After various pleadings and counter pleadings, the Commission rejected Laclede's arguments, holding that MRTC's ENGA cost recoupment was governed by the provisions of ENGA and the Administrator's Order No. 7 and that the standards and procedures of the NGA were inapplicable. It further examined in detail MRTC's ENGA cost recoupment filing

and found that it was in strict conformity with the Administrator's Order No. 7. It denied Laclede's application for rehearing.

Laclede sought review before the United States Court of Appeals. The Court of Appeals held that the Commission orders in question were entered "under ENGA in aid of the President's delegated authority" and that, since jurisdiction to review suits concerning exercise of authority under ENGA is lodged solely in the TECA, it lacked jurisdiction to entertain Laclede's petition for review. It subsequently denied Laclede's petition for rehearing and its suggestion for rehearing *en banc*.

Laclede now seeks issuance of a writ of certiorari from this court.

REASONS FOR DENIAL OF THE WRIT

The Court should deny certiorari because, contrary to Laclede's assertions:

1. The ruling of the United States Court of Appeals in this proceeding is not in conflict with any prior ruling by this Court or the ruling of any United States Court of Appeals or TECA, including, particularly:

   A. *Lo-Vaca Gathering Co. v. Railroad Commission of Texas;* [5] and

   B. *S.E.C. v. Chenery Corp.* [6]

[5] 565 F.2d 144 (Em. App. 1977).

[6] 332 U.S. 194 (1957).

2. This case is limited to the particular facts involved herein and will have no significant precedential effect on any other proceeding, either present, past, or future.

3. Laclede, having sought judicial review in the wrong forum since it recognized it had no case under ENGA, should not now be heard to complain that it has been denied its right to judicial review.

1. The Ruling Of The Court Of Appeals In This Case Is Not In Conflict With Other Judicial Decisions.

Laclede (Petition, pp. 6-10) asserts that the ruling of the Court of Appeals in this case is in conflict with the decision of the TECA in *Lo-Vaca Gathering Co. v. Railroad Commission of Texas, supra,* and with the ruling of this court in *S.E.C. v. Chenery Corp., supra.* To the contrary, such holdings are entirely in accord.

A. Lo-Vaca Gathering Co. v. Railroad Commission of Texas

In *Lo-Vaca,* an order of the ENGA Administrator directed an intrastate gas company to transport natural gas and fixed the amount of compensation which the gas company was to be paid for rendering such transportation services. A state regulatory agency, exercising jurisdiction over the company's activities, subsequently issued an order directing the disposition of the revenues received for the transportation services by requiring the crediting of the revenues to existing customers. The company sought to have the state agency order set aside by the TECA on the

ground that it was in conflict with the order of the Administrator and that it thus fell within the ambit of Section 14 of ENGA (providing for the preemption of conflicting orders of state governments with respect to ENGA transactions). The TECA properly dismissed the complaint for lack of jurisdiction. In *Lo-Vaca,* the Administrator's order did not deal with the *disposition* of compensation once it had been paid to the company — it merely fixed the amount to be paid. The subject of the state agency's order was entirely different from, and obviously not in conflict with, that of the ENGA Administrator and, thus, the "preemption" provisions of ENGA were not called into play as claimed by the gas company. Additionally, the Administrator's order in that case did not delegate any authority to the state agency to discharge a function of the Administrator. Consequently, in *Lo-Vaca,* jurisdiction was found lacking under the preemption provisions of ENGA, and no claim could be made with respect to agency exercise of delegated authority under ENGA. Clearly, the TECA had no jurisdiction to review the complaint on any basis.

Unlike *Lo-Vaca,* however, in the instant case the ENGA Administrator's Order No. 7 specified in detail the mechanics for MRTC's ENGA cost recoupment and delegated to the Commission the limited authority to determine whether or not the proposed recoupment was in accord with the Administrator's Order. Thus, the Court of Appeals was asked in this case to review an action "under ENGA in aid of the President's delegated authority." [7] The Court of Ap-

[7]Order of the United States Court of Appeals for the District of Columbia Circuit issued April 19, 1979, in *Laclede Gas Company v. Federal Energy Regulatory Commission* (Petition, p. A-3).

peals properly held that the jurisdiction for such review was vested solely in the TECA. There is no conflict in this holding with that of *Lo-Vaca.* This case involves review of actions taken pursuant to authority lawfully delegated under ENGA; *Lo-Vaca* involved review of state agency action not preempted by any orders issued under ENGA.

While *Lo-Vaca* was concerned with the issue of jurisdiction under ENGA, it is inapposite to the instant case. *Lo-Vaca* related to the possible interplay between ENGA and a *state* agency order, and did not touch upon a point that is central to the decision which is being challenged here. In order to insure the effectiveness of ENGA, Congress deliberately and carefully insulated ENGA jurisdiction from any possible infringement by the existing *federal* regulatory scheme administered by the Commission under the NGA. This is evident from the legislative history of ENGA and from the provisions of ENGA itself. ENGA was a short-term, emergency measure designed to provide rapid solutions to the immediate crises created by the critical shortage of natural gas experienced during the 1976-77 winter. Congressional recognition that existing federal regulatory mechanisms were inadequate to provide the prompt responses necessary to ward off the imminent dangers to life and property then occurring pervades the legislative history of ENGA. [8] Congressional debate repeatedly relfected concern over the possibility that if jurisdiction under ENGA was not totally segregated from that under the NGA the substantial body of case law relating to both procedural and substantive matters under the NGA would be read into ENGA making it so cumber-

[8]cf. 123 Cong. Rec. S. 1559-1560 (daily ed. Jan. 28, 1977) (Remarks of Senator Stevenson).

some that the critical objectives of the temporary legislation could not be achieved.[9] Because of such concerns, Congress provided that ENGA be administered by the President rather than the Commission. By Executive Order No. 11969, 42 Fed. Reg. 6791 (Appendix A hereto), the President, in turn, delegated most of his powers under ENGA to the Chairman of the Commission. The delegation order also reflected the same appreciation for the need to insulate ENGA authority from NGA jurisdiction as was demonstrated by Congress; it provided (Section 1):

> "... Nothing in such delegation shall be construed as delegating such authority to the Federal Power Commission as a collective body, except insofar as the Chairman may further delegate his authority under Section 3 of this Order."

To provide the mechanics to be utilized by interstate pipelines for flowing through costs incurred under Section 6 of ENGA, the Administrator issued Order No. 7 which specified in detail the *only* methods which could be used for ENGA cost recovery. Such methods were not suggested, they were mandated, The applicable portions thereof are set forth as Appendix B hereto. Order No. 7 provided several

[9]cf. 123 Cong. Rec. S. 1668 (daily ed. Jan. 31, 1977) (Remarks of Senator Stevens):

> "... I fear that if this authority is delegated to the Federal Power Commission, which already has a basic due process fabric created in regulation, court decision, and other acts of Congress, there is a possibility that a court might determine that what we have intended under this act could not be achieved because of other acts, regulations, or court decisions."

methods for ENGA cost recoupment; and, in circumstances (such as United's and MRTC's) in which ENGA costs exceeded a stated proportionate level, Order No. 7 provided two methods for recoupment of such costs. Under the method utilized by United, pipelines were permitted to simply bill the costs directly to customers on a current basis. No filing was required at the Commission and in no manner was the Commission involved. Under the method used by MRTC, EGNA costs were billed over a longer period, with the charges to each customer being set forth on a tariff sheet filed with the Commission. In this latter instance, review for compliance with Order No. 7 was the only ENGA function delegated by the Administrator. He clearly did not contemplate, nor does Order No. 7 evidence any intent, that the Commission exercise any jurisdiction under the NGA. Order No. 7 was specific in its ENGA cost recoupment requirements; the Commission was not free either to authorize or direct the use of different, or even modified, cost recovery methods.

Grasping for a legal basis for its assertion that jurisdiction under the NGA is applicable here, Laclede says "[i]t is undisputed that the Administrator of ENGA issued no order respecting MRT's transactions" (Petition, pp. 6-7); and with this same rationale, Laclede claims (Petition, p. 8) that the explicit protection of Section 6(b)(1)(B) of ENGA (Petition, p. A-49) given to "any natural gas company" from the provisions of the NGA is applicable only if the Section 6 (sale or transportation) transaction "had been specifically approved by the Administrator." To imply that the provisions of ENGA are not applicable to MRTC merely because MRTC was not specifically named

in an Administrator's order is rediculous. The Administrator's Order No. 7 was an order of *general* applicability, prescribing procedures to be utilized by *all* interstate pipeline companies to flow-through ENGA costs; and, as such, it was certainly an order "respecting MRT's transactions" in this case. Additionally, Laclede's contention that ENGA's Section 6 restrictions on NGA jurisdiction are inapplicable because the transaction was not "specifically" authorized conveniently disregards the facts that United's purchases were authorized (Laclede has not claimed otherwise) and that, as noted by the Commission in its February 27, 1978 "Order Granting Rehearing," (Petition, p. A-23) the Administrator himself stated:

> ". . . When a transaction is made under that order, (Order No. 2 setting forth criteria for ENGA purchases) including all delivery or transportation arrangements, *whether or not covered by an express authorization of the Administrator in a specific order,* the transaction shall be deemed to be 'authorized' and 'ordered' for purposes of Section 6 and 9 of the Act." (Emphasis and parenthetical supplied)

In the Commission orders complained of by Laclede, the Commission made a thorough and well-reasoned analysis of its authority to deal with MRTC's ENGA cost recoupment. It found that ENGA and the ENGA Administrator's Order No. 7 were applicable to MRTC's ENGA cost recoupment. It found that, as a result, its authority with respect to MRTC's ENGA cost recoupment

filing was limited to a determination as to whether or not it conformed with the ENGA Administrator's Order No. 7. It carefully scrutinized MRTC's filing and found it to be in strict compliance with Order No. 7. Laclede's contentions are, at best, collateral attacks on Order No. 7 and upon ENGA itself. [10]

There simply is no factual or legal basis whatever for a claim that the Court of Appeals decision herein conflicts with the *Lo-Vaca* decision, and Laclede's claim of conflict is a "bookstraps" exercise.

B. S.E.C. v. Chenery Corp.

Laclede asserts (Petition, p. 11) that the Court of Appeals' ruling is in conflict with *Chenery, supra,* in that the Court ascribed a legal basis for the Commission's action in this case different from that stated by the Commission. Laclede's assertion is completely erroneous.

Laclede claims that the Commission stated that it had acted under the NGA. Throughout the two Commission orders complained of by Laclede, the Commission made clear that it was limited to and applying the standards of ENGA and the Administrator's Order No. 7 thereunder (*see, e.g.,* Petition. pp. A-18-A-30, A-33-A-36). At no place

[10] In its zeal to get the Court's attention, Laclede has attempted to stigmatize MRTC's filing by twice using the now popular term "windfall profits." However, the use of this epithet in a proceeding respecting a filing which fully conformed with Order No. 7 is plainly inappropriate and improper. Laclede is really complaining about the operation of Order No. 7, even though the order's procedures resulted in the recovery not of "windfall profits," but only of ENGA gas costs that had actually been incurred.

in its orders did the Commission say that the provisions of the NGA were applicable to MRTC's ENGA cost recoupment. Likewise, the Commission's brief to the Court of Appeals made clear that it had been bound by and applied the standards of ENGA and the Administrator's Order No. 7 and not those of the NGA.

In its Petition herein, Laclede seizes upon the jurisdictional statement in the Commission's brief to the Court of Appeals as justifying a claim that the Commission acted under the NGA and not under ENGA, contrary to the clear import of the Commission's Orders in question and its brief in total. Laclede then claims that the Court of Appeals' ruling herein violates *Chenery, supra.* Laclede is wrong.

In *Chenery,* this Court stated (at pp. 196-197):

"When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency ****

"We also emphasized on our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess

at the theory underlying the agency's action; nor can a court by expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023."

In this case, the Commission fully complied with the requirements of *Chenery.* There could be no doubt from its orders that it held that it was bound by and applying the standards of ENGA and Order No. 7 promulgated thereunder, and not those of the NGA. Were such not the case the Commission could never have reached its conclusion "that under the circumstances of this case the Commission is without authority to suspend or disallow rates derived from authorized ENGA purchases calculated in accordance with the Administrator's Order No. 7." (February 27, 1978 "Order Granting Rehearing," see Petition, p. A-29).

Laclede attempts to convert a passing statement by appellate counsel in brief into a claim that the reviewing court ascribed a legal basis to the Commission's action different from that contained in the Commission's orders. MRTC submits that Laclede's attempt is nothing more than a reverse twist on the practice condemned by this Court in *Federal Power Commission v. Texaco, Inc., et al.,* 417 U.S. 380, 41 L.Ed. 2d 141, 94 S.Ct. 2315 (1974), where it stated:

"But as it is, we cannot accept Appellate counsel's post hoc rationalizations for agency

action; for an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself."

Finally, it must be recognized that the "new legal basis" which Laclede claims the court has ascribed to the Commission's action involves the fundamental power of the court to hear the case. Laclede's claim appears to be that the Court of Appeals was somehow invested with jurisdiction simply because the Commission itself may not have asserted in its jurisdictional statement that the case arose under ENGA and that jurisdiction was thus lacking in the Court of Appeals. This claim is without legal basis. Regardless of isolated statements which may be pulled from the parties' briefs, it is a long settled and well established legal principal that:

". . . . the parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress. The parties cannot waive lack of jurisdiction, whether by express consent,[5] or by conduct,[6] nor yet even by estoppel.[7] The court, whether trial or appellate, is obliged to notice want of jurisdiction on its own motion . . . .

"This doctrine is embodied in the Federal Rules of Civil Procedure. Most defects are waived if the party fails to assert them at the time specified by the rules, but it is specifically provided that whenever it appears by suggestion of the parties or

otherwise that the court lacks jurisdiction of the subject mater, the court shall dismiss the action.'" (Footnotes omitted) [11]

Thus, the fact that this proceeding arose under ENGA and not under the NGA is binding on the Court of Appeals notwithstanding the claims of any party to the proceeding.[12] Accordingly, the Court of Appeals was obliged to dismiss the action for want of jurisdiction.

2. This Case Is Limited To The Particular Facts Involved Herein And Will Have No Significant Precedential Effect On Any Other Proceeding, Present, Past, Or Future.

As found by both the Commission and the Court of Appeals, this case is governed by the provisions of ENGA. ENGA was a short term, emergency measure designed to provide immediate relief from the dangers posed by the severe 1976-77 winter and the critical shortage of natural gas being experienced at that time, pending action on longer-term legislation dealing with the nation's energy problems. The emergency purchase authority granted by ENGA expired by the terms of the statute on August 1, 1977, and the Regulations promulgated thereunder since have been physically removed from the Code of Federal Regulations. To MRTC's knowledge, this is the only proceeding related to Commission orders dealing with the flow-through of costs incurred pursuant to the pro-

[11] Wright, *Fed. Courts*, 2d Ed. H.B., 3rd Reprint, 1973, pp. 15-16.

[12] *See also, Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F.Supp. 1094 (1968).

visions of ENGA that has reached the appellate courts.

Attempting to obscure the fact that this case involves only the operation of ENGA and paint it as a case of lasting signficiance, Laclede claims (Petition, pp. 10-11) that the Court of Appeals' ruling will totally deprive ratepayers of any opportunity for judicial review of flow-through of costs of emergency gas under the Natural Gas Policy Act of 1978 ("NGPA"),[13] the Congress' long-term response to the natural gas shortage. The attempt is a failure.

Although Laclede points out the similarity of ENGA and NGPA with respect to emergency purchases, it ignores the basic difference in purpose and administratin of the two acts. ENGA was an emergency measure which provided for its total implementation and administration solely by the President or his delegate, not by the Commission. Conversly, the NGPA is a long range act which provides for implementation and administration primarily by the Commission, except with respect to emergency gas supply transactions which are to be administered by the President. It is *only* in these emergency situations that judicial review of actions taken under the NGPA is vested in the TECA.

Laclede contends (Petition, p. 11) that the juxtaposition of the TECA's holding in *Lo-Vaca* with that of the Court of Appeals' holding in this case effectively deprives ratepayers of judicial review of orders under the NGPA relating to flow-through of emergency gas purchase transactions under that Act. This argument is without merit. The NGPA has already resulted in more abundant interstate gas supplies, and it is highly questionable whether a nationwide

[13]Pub. L. No. 95-621 (1978).

gas supply emergency of the type and severity experienced during the 1976-77 winter will ever again occur. This being so, there is no way to determine whether the emergency powers given the President by the NGPA will ever be exercised. Additionally, if such powers are ultimately exercised, there is no way of determining the manner (*i.e.*, directly or through delegation) in which such will be done. Only in the coincidental situation that administration of NGPA emergency powers is structured identically with the administration of powers under ENGA could the Court of Appeals' ruling in this case be extended to emergency actions under the NGPA. Most significantly, however, as has been shown above, there is no conflict between the TECA's holding in *Lo-Vaca* and that of the Court of Appeals in this case — if the action sought to be reviewed were that of the President, his delegate or sub-delegate, TECA is vested with exclusive review jurisdiction and, if not, review jurisdiction is vested in the Court of Appeals. The same would be true under the NGPA *if* the Court of Appeals' holding in this case were ever applicable. Consequently, contrary to Laclede's claim, the asserted "conflict" does not deprive any party of judicial review.

3. Laclede, Having Sought Judicial Review In The Wrong Forum Since It Recognized It Had No Case Under ENGA, Should Not Now Be Heard To Complain That It Has Been Denied Its Right To Judicial Review.

As above shown, the fundamental basis of Laclede's position both before the Commission and before the court has been that the Commission should have applied the

substantive and procedural standards of the NGA and not those of the ENGA. Had Laclede filed its petition for review in the TECA, it would have been admitting that the case was governed by ENGA, and not the NGA. Thus, tactically, the filing of its petition in the Court of Appeals gave color to its arguments.

Having elected to proceed in the wrong court for obvious reasons of strategy, Laclede should not now be heard to complain that it has been denied judicial review.

CONCLUSION

WHEREFORE, MRTC respectfully requests that the Court deny Laclede's petition for a writ of certiorari.

Respectfully submitted,

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September 27, 1979

CERTIFICATE OF SERVICE

I hereby certify that I have this day deposited in the mails, first class postage prepaid, a copy of the attached brief of Mississippi River Transmission Corporation addressed to each of the following:

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Dated at Washington, D.C. this 27th day of September, 1979.

Wm. W. Bedwell

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APPENDICES

APPENDIX A

Executive Order No. 11969, Administration of the
Emergency Natural Gas Act of 1977
February 2, 1977

THE PRESIDENT

Executive Order 11969 February 2, 1977

Administration of the Emergency Natural Gas Act of 1977

By virture of the authority vested in me by the Constitution and statutes of the United States of America, including Section 19 of the Emergency Natural Gas Act of 1977 (Public Law 95-2), and Section 301 of Title 3 of the United States Code, and as President of the United States of America, it is hereby ordered as follows:

Section 1. There is hereby delegated to the Chairman of the Federal Power Commission, hereafter the Chairman, all of the authority vested in the President by the Emergency Natural Gas Act of 1977, except for the authority to declare and terminate a natural gas emergency pursuant to Section 3 of said Act. Nothing in such delegation shall be construed as delegating such authority to the Federal Power Commission as a collective body, except insofar as the Chairman may further delegate his authority under Section 3 of this Order.

Sec. 2. The Chairman shall, to the extent he deems appropriate, consult with the Secretary of the Interior, the Administrator of the Federal Energy Administration, other members of the Federal Power Commission and the heads of other Executive agencies in exercising the authority delegated to him by this Order.

Sec. 3. All authority delegated to the Chairman by this Order may be further delegated, in whole or in part, by the

Chairman to any other officer of the United States or to any Executive agency.

Sec. 4. The heads of all Executive agencies shall cooperate with and assist the Chairman in carrying out the authority delegated to him by this Order.

Sec. 5. All Executive agencies shall, to the extent permitted by law, provide the Chairman on request such administrative support and information as may be necessary to carry out the authority deleged to him by this Order.

Jimmy Carter

The White House,
February 2, 1977.

[FR Doc. 77-3906 Filed 2-3-77; 12:01 pm]

FEDERAL REGISTER, VOL. 42, No. 24-Friday,
February 4, 1977

APPENDIX B

Relevant Provisions Of Order No. 7
Issued By The Administrator,
Emergency Natural Gas Act of 1977
April 22, 1977

RELEVANT PROVISIONS OF ORDER NO. 7 ISSUED BY THE ADMINISTRATOR, EMERGENCY NATURAL GAS ACT OF 1977
April 22, 1977

"Pursuant to Section 7 of the Act and the authority granted to me by the President in Executive Order No. 11969 (February 2, 1977), Part 1000 of Chapter X of Title 18 of the Code of Federal Regulations is amended by adding a new section 1000.9 as follows:

1000.9 ALLOCATION OF CHARGES FOR EMERGENCY PURCHASES

* * * * *

(d) Section 6 gas purchased for system supply shall be allocated to all customers in proportion to system volumes purchased by each customer during the applicable billing period. The charges for such volumes shall be billed pursuant to paragraph (e) below.

(e) The following billing procedures may be utilized by interstate pipeline companies to flow-through all authorized costs[12] of ENGA purchases pursuant to Section (6) of the Act:

(1) If the purchases are 2.0 percent or less of an interstate pipeline company's total purchases for the monthly billing period as forecasted in its September 1976 FPC Form No. 16 for the months

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[12]Refers to purchases authorized by the Administrator or consistent with the guidelines laid down by the Administrator in various orders. (Footnote in Order)

of February and March 1977 and for ensuing months its April 1977 Form No. 16, the interstate pipeline company is authorized by the Administrator to seek FPC approval to use its effective FPC PGA tariff provision to flow the allocable jurisdictional costs through to its jurisdictional customers.

(2) If an interstate pipeline company's monthly ENGA purchases exceed 2.0 percent of its forecasted monthly sales in its September 1976 FPC Form No. 16 for the months of February and March 1977 and for ensuing months its April 1977 FPC Form No. 16, alternate billing options are available to the company. ENGA purchases would be allocated pro rata to its customers and storage on the basis of total sales and general system storage injections for the billing month and may be recovered as follows:

(i) The company may utilize the procedure set forth in FPC Docket No. RM77-10 which provides for notification of the costs of ENGA gas allocated to each customer on the billing date following delivery and recovery of the costs in the following monthly billing; or

(ii) The company may elect to bank the ENGA costs allocated to each customer through July 31, 1977. These banked costs, plus carrying costs computed at nine (9) percent per annum, would be recovered from each customer over an

eleven month period beginning October 1, 1977 and ending August 31, 1978. Individual surcharges for each customer would be computed by dividing each customer's banked costs by each customers forecasted eleven month sales included in the pipeline company's September 1977 FPC Form No. 16.

(3) If an interstate pipeline company elects to utilize the revenue recovery procedures provided in 2(ii) above, each individual surcharge will remain in effect until the interstate pipeline company recovers banked costs, plus applicable carrying charges. These individual surcharges should be set forth on a tariff sheet filed with the FPC."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-321

LACLEDE GAS COMPANY

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND
MISSISSIPPI RIVER TRANSMISSION CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Federal Energy Regulatory Commission, in its Opposition to Laclede Gas Company's petition for a writ of certiorari, states:

> Laclede filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit under Section 19(b) of the

Natural Gas Act, 15 U.S.C. 717r(b). That court dismissed the petition on the ground that "petitioner's suit arises under the Emergency Natural Gas Act of 1977 *** and in accordance with §10(b) of the Act, is within the exclusive jurisdiction of the Temporary Emergency Court of Appeals ***" (Pet. App. A3).

* * *

The decision of the court of appeals is correct.

* * *

The Commission's decision . . . was . . . the adjudication of a question under the ENGA, and therefore reviewable only in TECA.

(FERC Brief in Opposition at 4-5).

In reply, Petitioner, Laclede Gas Company quotes from the Brief of the Federal Energy Regulatory Commission to the United States Court of Appeals for the District of Columbia Circuit:

> Jurisdiction in this proceeding *lies under Section 19(b) of the Natural Gas Act (15 U.S.C. §717r). Section 10 of the Emergency Natural Gas Act of 1977 (ENGA) . . . is inapplicable in this proceeding* which limits review of orders under that Act to the Temporary Emergency Court of Appeals. The orders under review herein *are under the Natural Gas Act.* (emphasis supplied).

(FERC Brief to D.C. Cir. at 2-3).

Respectfully submitted,

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November 13, 1979